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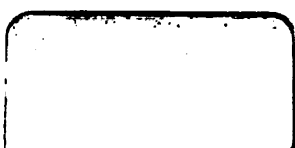
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THE  
**MANITOBA REPORTS**  
VOLUME XXIII.  
CONTAINING  
REPORTS OF CASES DECIDED IN THE  
COURT OF KING'S BENCH  
AND  
COURT OF APPEAL  
FOR  
**MANITOBA.**

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*Barrister-at-Law.*

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**HON. JAMES EMILE PIERRE PRENDERGAST.**

**HON. ALEXANDER CASIMIR GALT.**

**HON. JOHN PHILPOT CURRAN.**

# **ERRATUM.**

**Page 730**

The second line of the judgment of **PERDUE, J.A.**, should read  
as follows:—

“was to the effect that it had not been proved that the”

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REPORTS OF CASES  
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The Court of King's Bench  
AND  
The Court of Appeal  
FOR  
MANITOBA.

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PENTLAND V. MACKISSOCK.

Before GALT, J.

*Vendor and purchaser—Cancellation of agreement of sale for default—Redemption.*

In an action by the vendor of land for the foreclosure of the rights of the purchaser by reason of his default in payment of a subsequent instalment of the purchase money, and for a declaration that the agreement has been cancelled and any moneys already paid forfeited, pursuant to the provisions of the agreement, the plaintiff is not entitled to judgment for immediate cancellation, although the defendant admits his liability, but the Court will allow him three months to redeem.

*Canadian Fairbanks Co. v. Johnston*, (1909) 18 M.R. 590, followed.

It is not necessary that the defendant should expressly ask for this relief in his statement of defence.

DECIDED: 7th January, 1913.

THE defendant, a married woman, bought certain property from her husband for \$8,250 on an agreement of sale, which provided that she was to assume a mortgage of \$4,250; the cash payment was \$750, the balance to be paid by instalments. Subsequently the husband assigned his rights under the agreement to the plaintiff. Statement

As the purchaser of the property had not paid two of the instalments due, the plaintiff, as assignee of the agree-

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ment, gave her thirty days' notice of cancellation under the clause in the agreement. He then brought this suit to have the agreement foreclosed.

The defence set up was that the purchaser had made two subsequent payments of \$225 and \$325 to the original vendor without notice of the assignment to the plaintiff, and that, therefore, she was not in default under the agreement and the agreement could not be foreclosed, being in good standing by reason of such payments.

It was shown on her examination for discovery that a registered notice of the assignment had been actually received by the defendant and the proper notice of cancellation had been personally served on her.

*H. Phillipps and C. S. A. Rogers* for plaintiff.

*A. E. Dilts* for defendant cited *Canadian Fairbanks v. Johnston*, 18 M.R. 590; *Perks v. Scott*, 21 M.R. 581, and *Whilla v. Riverview*, 19 M.R. 746.

GALT, J. In this case the plaintiff asks for a declaration that the agreement for sale in the pleadings mentioned has been cancelled and that he is entitled to retain any moneys paid under it and to possession of the lands. The purchase money was over \$8,000, and the defendant paid \$750 on account and assumed a mortgage of \$4,250 as part of the consideration.

A plaintiff seeking such relief has certainly an awkward course before him owing to the conflict of decisions on the subject. In the present instance the plaintiff is further embarrassed by the fact that the defendant is a married woman, not apparently engaged in business and not conversant with the particular features of the law applicable to such transactions as this.

Under the terms of the agreement the whole amount of the purchase money has become due. The defendant did not make payment of the amount within the thirty days stipulated in the agreement and notice, and on the 14th November, 1912, this action was commenced.

It appears from the examination of the defendant for discovery that she was under the impression at first that she had not received the notice of the assignment of the agreement, or of the intention of the plaintiff to cancel the agreement; but, upon being cross-examined on the subject and upon production of documents, she admitted both. It was argued strenuously by Mr. Phillipps, on behalf of the plaintiff, that the denials in the statement of defence and the subsequent corrections of it in the evidence given by the defendant for discovery indicate a lack of *bona fides* on the part of the defendant, and, for this reason, among others, it was urged that the cancellation of the agreement should be immediate, without the usual time limit being granted to the defendant.

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By an arrangement made within the last day or two between the parties, no witnesses were called on either side, so the parties have argued this case upon documents verified by affidavit, and upon the evidence given by the defendant upon discovery. This leaves the Court in ignorance as to several material points of the case, for instance as to whether or not the defendant actually paid to Mackissock and Thomas the moneys she says she paid on account of the agreement. It is quite true that Mackissock and Thomas were not the vendors, but it might well have been that Peter Mackissock, the husband, might have instructed his wife that a payment to Mackissock and Thomas would be a payment upon the agreement. Then, again, when the defendant went to consult Mr. Coopar, her solicitor, we have no evidence of what took place except what the defendant herself says. There are other points also on which some material evidence might have been produced by the parties, but they have thought fit to leave the case as it is; the defendant admitting liability and only asking for the usual order granting her three months in which to redeem.

I have never been able myself to understand, when

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parties sign a definite agreement as to what is to take place on non-payment, or other default by one of them, why, in the absence of accident or mistake, the Court should paternally interfere in order to relieve the party in default.

In many cases a vendor might decline to sell unless he felt that his rights in that respect were protected, but the decisions of the Courts in Manitoba and the Western Provinces seem to leave the matter at such loose ends that it would be almost impossible for a lawyer, much less a layman, and especially a married woman, to know exactly whether, in any given case, the Court would, or would not, grant the usual three months for redemption.

It has been decided in *Canadian Fairbanks Co. v. Johnston*, 18 M.R. 590, that, under circumstances very similar to those in question here, the defendant was entitled to time for redemption, notwithstanding a breach of the agreement.

Under these circumstances I feel that it would be too much to expect that the defendant in this case could anticipate that her default would meet with any worse result than occurred in the *Fairbanks Case*, and in several other cases. I, therefore, find that the plaintiffs are entitled to succeed in the action, but that the defendant is entitled to the usual three months within which to redeem.

It was argued on behalf of the plaintiff that the defendant had not expressly asked for this relief in her defence. I do not think that was necessary. The plaintiff comes to Court aware of the law as laid down in the *Fairbanks* and other cases and of the usual judgment giving time for redemption.

Under these circumstances I think that judgment must be entered as indicated. Of course the plaintiff is entitled to his costs of the action, but not costs as between solicitor and client for which I see no special reason in this case.

*Re GILLESPIE.*

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Before GALT, J.

*Partnership—Assignment for benefit of creditors—Two separate businesses carried on by two persons as partners—Assignments Act, R.S.M. 1902, c. 8, s. 27—Ranking of creditors of partnership and of the individual partners.*

1. The fact that two partners carried on two separate businesses under different firm names does not make them members of two different co-partnerships within the meaning of section 27 of the Assignments Act, R.S.M. 1902, c. 8, and, although, on becoming insolvent, they make two separate assignments, under the Act, of all their property, both partnership and individual, except exemptions, all the partnership assets should be pooled and administered by the assignee as a single partnership estate.

*Banco de Portugal v. Waddell*, (1880) 5 A. C. 161, followed.

2. In such a case the creditors of either or both of the businesses are entitled to share in the pooled assets, and the separate creditors of each partner are entitled to payment out of the separate property of that partner. If, however, there are no separate creditors of one partner, the property assigned by him will form part of the partnership estate to be administered.

DECIDED: 16th January, 1913.

APPLICATION by an assignee under an assignment for the benefit of creditors of certain insolvent traders, for advice in respect of certain facts which were set forth in a statement agreed upon by counsel. Statement.

*J. Galloway* for the assignee.

*A. B. Hudson* for the Winnipeg Supply Company.

*J. W. E. Armstrong* for the St. Paul and Western Coal Company.

*P. J. Montague* for the Sootless Coal Company.

*A. C. Ferguson* for the Union Lumber Company.

*C. Isbister* for the Hanbury Manufacturing Company, the Vulcan Iron Works, and Brown and Mitchell.

*E. Frith* for the Manitoba Bridge and Iron Works.

GALT, J. It appears that Malcolm Gillespie and Joseph Hugh Ross Gillespie, both of the City of Brandon, in Manitoba, commenced business as contractors in the said City of Brandon, under the firm name of The

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Gillespie Elevator Construction Company, on or about the 18th of May, 1909, and continued to carry on the said business under the said name up to the 5th of March, 1912. A declaration of partnership relating to the said business was duly filed under the statute. Then one John R. Brodie commenced business as a coal dealer and coal merchant in the said City of Brandon on or about the 1st of August, 1909, under the name of The Standard Coal Company; and a declaration thereof was filed in the office of the Deputy Clerk of the Crown and Pleas on August 17th, 1909. On or about the 1st of October, 1910, the said Brodie sold the said business to the said Malcolm Gillespie and Joseph Hugh Ross Gillespie by an indenture bearing that date.

Upon the said 5th of March, 1912, each of said businesses and the said partners being insolvent, the said partners made two separate assignments, one in each of said firm names, for the benefit of their creditors under the Assignments Act, to James William Gordon Watson, of all the assets of the said partners, excepting their property exempt from sale or seizure under execution. And it is said that the two separate assignments were made as a result of some discussion between creditors.

The said businesses were carried on by the said partners under the said two firm names respectively and the several transactions of each business were recorded in separate sets of books of account and bank books, and the said partners used separate letterheads for each business. Both of said businesses were alike owned and conducted by the said partners and separate books were kept as aforesaid to enable them to record and ascertain the progress and results of each of the two lines of business in which they were engaged.

It appears from the auditor's statement of the affairs of the insolvents, prepared from the said books, that there is an indebtedness of \$1,566.31 of the Gillespie Elevator Con-

struction Company to the Standard Coal Co., of which the items are given.

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Besides the partnership assets as shown in said books of account transferred to the said Assignee the said partners have each transferred to the said Assignee, by separate transfers absolute in form, certain individual properties of each consisting of real estate in Brandon and Ninette. This was done with the intention that those properties should be applied in accordance with the rights of the joint or separate creditors as the case might be.

The assignee desires the advice of this Court on the following questions:—

1. Does the fact that the said two partners carried on business under two separate firm names under the circumstances above recited make them in fact and law members of two different co-partnerships within the meaning of section 27 of the Assignments Act, and must the partnership assets be treated as two partnership estates and wound up accordingly?

I think that nearly all the questions which arise in this application are covered by the case referred to by Mr. Ferguson on the argument, viz., *Banco de Portugal v. Waddell*, 5 A.C. 161, and cases cited therein. In that case two persons of the name of H. carried on trade in Portugal as wine exporters, under the style of H. Brothers, and the same two persons carried on trade in London as wine merchants, under the style of H. & Sons. The practice of the business was for H. Brothers to draw bills on H. & Sons, etc. It appeared in that case that bankruptcy proceedings were taken in England against H. & Sons, and almost simultaneously proceedings were taken in Oporto, Portugal, against H. Brothers, and the creditors in Portugal had attached all the assets of the firm there and had received dividends therefrom. Afterwards they applied in England for liberty to rank for the balance due to them on the assets in England. In delivering

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judgment Earl Cairns, Lord Chancellor, points out that in such a case as that the foreign creditors have a perfect right to retain all the dividends or assets which they managed to lay hold upon in the foreign country; but if they came to England to rank there they would have to bring into account all the dividends that they had received before they would be entitled to rank in England. Then he quotes the statute relating to the matter:—

“If any bankrupt is at the date of the order of adjudication liable in respect of distinct contracts as member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of such contracts against the properties respectively liable upon such contracts,” and proceeds to say: “That supposes a case which it seems to me is perfectly foreign to the present. This is simply the case of one bankrupt firm. It happens to be two persons trading together in Portugal and in England, but it is just the same case as if it were one person trading in Portugal, and the same person trading in England; the two persons do not constitute different firms because they trade in Portugal and also in England, and there is not that diversity which is necessary to bring the section of the Act of Parliament which I have just read into operation.”

Consequently he finds that H. & Sons and H. Brothers constituted a single partnership; but, owing to the circumstance that some of its business was being conducted in Portugal, he points out the peculiarity of the rights of the foreign creditors there to get all they could out of the assets in Portugal.

In the present case the partners had just one place of business. They were the sole owners of both branches of the business; they occupied the same building apparently and the same rooms. They had different books; but that circumstance does not alter their position. The same circumstance existed in the Waddell case. It seems to me,



therefore, that the two businesses carried on by the two Gillespies under separate names were just branches of the same firm, and that all the creditors of each of those businesses, so to speak, are simply creditors of the one firm. Consequently the partnership assets should be, to use the language of the statement of facts here, "pooled and wound up as a single partnership estate."

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That sufficiently disposes of the next question as to the sum of \$1,566.31, which is expressed this way: "If there are two distinct partnership estates, should the sum of \$1,566.31 be paid by the Gillespie Elevator Construction Company estate to the Standard Coal Company estate before distribution." As I have found that there is only one partnership the money will belong to the firm.

The third question is, in what order should the following classes of creditors, namely: Creditors of the business of the Gillespie Elevator Construction Company; creditors of the business of the Standard Coal Company, and creditors of Joseph Hugh Ross Gillespie individually, share in the following classes of assets respectively, etc.

The creditors of either or both of the businesses are entitled to share in the partnership assets of the partnership. The separate creditors of Joseph Hugh Ross Gillespie are entitled to payment out of the separate property of Joseph Hugh Ross Gillespie.

There do not appear to be any separate creditors of Malcolm Gillespie, so that the property assigned by him will simply go into the estate and form part of the partnership estate to be wound up.

I think that the questions submitted were reasonable to be asked, and that the costs of all parties should be paid out of the estate.

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## CLARK v. WILSON.

Before GALT, J.

*Partnership—Costs in partnership action—Partnership assets, what are—Partnership Act, R.S.M. 1902, c. 129.*

The rule as to costs of a partnership action is that they should be paid out of the partnership assets unless there is some good reason to the contrary, and the unsuccessful assertion of some right is not of itself sufficient reason for departing from that rule. There must be either misconduct or negligence on the part of one partner to warrant his being ordered to pay costs.

Partnership assets mean the assets remaining after payment of all the partnership debts including balances due to any of the partners. *Hamer v. Giles*, (1879) 11 Ch.D. 942, and *Austin v. Jackson*, reported in foot note to that case.

When, therefore, there are no partnership assets in the above sense, there should be no order as to costs.

DECIDED: 5th February, 1913.

Statement      FURTHER directions and costs.

The following facts are taken from the judgment:—

The plaintiff and defendants were partners in a legal firm doing business at Dawson in the Yukon, commencing on the 1st day of June, 1900. On July 2nd, 1910, the plaintiff brought this action alleging that the partnership was dissolved on the 1st day of May, 1906, and claiming an account of the partnership dealings, etc.

The defendants Wilson and Stacpoole each denied that the partnership continued until May 1, 1906. The defendant Stacpoole claimed special equitable relief against the plaintiff upon the ground that the plaintiff had for many months absented himself from Dawson, and thereby necessitated much additional work by the defendant, which should have been performed by the plaintiff. The plaintiff, in his reply, contested this equitable claim.

The action was tried on March 30, 1911, and the Court found in favor of the plaintiff that the partnership existed down to May 1, 1906. The Court found in favor of the defendants as regards the right to

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compensation for services, if any, rendered by them, and occasioned by the absence of the plaintiff from the business of the partnership between March 20 and May 1, 1906, and that, in taking the accounts directed by the judgment, the defendants should be at liberty to submit any claims therefor as and by way of just allowances. The trial Judge reserved further directions and the question of the costs of the action until after the Master should have made his report.

The defendant Stacpoole appealed from the judgment, but the appeal was dismissed with costs.

Under the report subsequently made by the Master on November 29, 1912, it was found, amongst other things, that the profits made by the firm of Clark, Wilson & Stacpoole between March 20 and May 1, 1906, amounted to the sum of \$1,628.08, and that it was proper to allow to the defendants out of this amount the sum of \$1,176.50 in respect of the business having been exclusively conducted by them during that period; that the sum of \$2,935.77 was due to the plaintiff from the defendants, and that the law library of the firm (which practically comprised all the outstanding assets) had been sold for the sum of \$602.50, which had been paid into court.

The Master also reported, at the request of the plaintiff, that he allowed no interest on the amount found in his favor although the defendants had had the money for an average period of six years, being of opinion that interest was not payable by law under the circumstances. The report was not appealed from, or otherwise objected to on this motion.

*P. A. Macdonald* for plaintiff cited *Butcher v. Pooler*, 24 Ch. D. 273.

*C. Isbister* for defendant Wilson.

*D. A. Stackpoole* for defendant Stacpoole cited *Chap-*

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Argument.

*man v. Newell*, 14 P.R. 208; *Mitchell v. Lister*, 21 O.R. 318; *Hamer v. Giles*, 11 Ch. D. 942, and *Ross v. White*, [1894] 3 Ch. 326.

GALT, J. The plaintiff now asks for: (1) Payment out to him of the moneys in court; (2) That each of the defendants be ordered to pay one-half of the balance due to the plaintiff after deducting the amount received from court; (3) Costs of this action up to the hearing, and (4) Costs of the appeal by defendant Stacpoole.

Item No. 4 is already provided for by the judgment of the Court of Appeal.

The defendants contend that no costs of the action should be allowed to any one; but that the costs of all parties to the reference should be taxed and paid out of the moneys in court.

Section 42 of The Partnership Act, R.S.M. 1902, c. 129, provides for the distribution of moneys after dissolution of the partnership, but contains no reference to costs. It reads as follows:

"On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may, on the termination of the partnership, apply to the Court to wind up the business and affairs of the firm."

The rule as to costs, in actions such as the present one, is that the costs of the action should be paid from the commencement out of the partnership assets, unless there is some good reason to the contrary; but partnership assets mean the assets remaining after payment of all the partnership debts including balances due to any of the partners: *Hamer v. Giles*, 11 Ch.D. 942.

In *Austin v. Jackson*, reported in the foot-note to *Hamer v. Giles*, Jessel, M.R., said: "The rule in *Hamer v. Giles* only applies where there are actual partnership assets. The balance due to the plaintiff (one of the partners) must be treated like a debt due to an outside creditor." See also *Ross v. White*, [1894] 3 Ch. 326; *Chapman v. Newell*, 14 P.R. 208, and *Mitchell v. Lister*, 21 O.R. 318.

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Under the above authorities the plaintiff is clearly entitled to all of the moneys in court.

As regards the costs of the action up to the hearing, the plaintiff relies upon a passage from *Lindley on Partnership*, 8th ed. 597, by way of an exception to the rule whereby the costs of all parties are paid out of the assets. The passage in question is: "But, where the action is really instituted to try some disputed right, the unsuccessful litigant will be ordered to pay the costs up to the trial of the action"; and plaintiff contends that the defendants disputed his right to share in the profits of the firm down to May 1, 1906. I have examined the cases referred to in the foot-note to that passage, but they fall short of establishing the words in the text. It seldom happens that actions are defended when there is no disputed right to try. This question is dealt with in the authorities above mentioned, and the exception appears to be limited to cases of misconduct or negligence, neither of which is alleged or proved in this case. Moreover, at the trial the defendants succeeded in respect of a substantial equitable claim which had been denied by the plaintiff.

Under the judgment the defendants were entitled to equal shares, and the report shows that they drew out equal amounts from the partnership assets, so that each is liable to refund to the plaintiff one-half of the amount found due as aforesaid.

The amount of the moneys in court will, therefore, be

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deducted from the total amount due to the plaintiff, and judgment will be entered against each defendant for one-half of the balance.

There being no partnership assets remaining after payment out to the plaintiff of the moneys in court, there will be no order as to costs.

### COURT OF APPEAL.

#### *Re CRABBE AND SWAN RIVER.*

Before PERDUE, CAMERON and HAGGART, JJ.A.

*Municipal Corporations—Licensing of pool-rooms—By-law—Ultra vires—Municipal Act, R.S.M. 1902, c. 116, s. 640, s-s. (a) as re-enacted by 6 & 7 Edw. VII, c. 27, s. 10—Revocation of license—Three-fourths majority—Licensee not heard—Presumption of good faith.*

Under sub-section (a) of section 640 of the Municipal Act, as re-enacted by 6 & 7 Edward VII, c. 27, s. 10, which empowers a municipality to pass by-laws for licensing, regulating and governing pool-rooms, and for revoking any such license on grounds to be fixed by by-law, the Council of the Town of Swan River passed a by-law providing for the issue of pool-room licenses and that when, in the opinion of the Council, any such licensee has allowed profanity or gambling or boisterous conduct in the licensed premises \* \* \* \* then such licensee shall be liable to have his license revoked, upon a motion of the Council carried by a three-fourths majority.

In his application for such a license, the appellant agreed that the license should be subject to such by-law, and the license issued to him was made subject to this by-law.

On application by the appellant to quash a resolution of the Council subsequently passed by a three-fourths majority cancelling his license forthwith,

*Held* (1) The by-law was authorized by the statute, and should not be set aside either as unreasonable or discriminatory, and, therefore, the license, being subject to this by-law, was revocable as therein provided.

(2) The licensee, having accepted his license subject to the provisions of the statute and of this by-law, and there being nothing to suggest that the Council acted arbitrarily or otherwise than with a *bona fide* desire for the peace and good government of the town, and with full knowledge of the facts, their resolution should not be quashed because it was passed without notice to the licensee and he was not given an opportunity of showing cause against it.

- (3) Swan River being a small town, it should be assumed that the Council fairly represented the citizens of it and would either have knowledge of the facts from personal observation or would inform themselves of the existing conditions before taking such action as they did.

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*Kruse v. Johnson*, [1898] 2 Q. B. 91, and *Walker v. Stratton*, (1896) 12 T.L.R. 363, followed as to the principles to be applied in dealing with by-laws of municipalities attacked as being unreasonable or *ultra vires*.

*Scott v. Pilliner*, [1904] 2 K. B. 855, and *Strickland v. Hayes*, [1896] 1 Q. B. 296, distinguished.

DECIDED: 20th February, 1913

MOTION made under section 427 of the Municipal Act, R.S.M. 1902, c. 116, to quash a resolution passed by the Council of the Corporation of the Town of Swan River, cancelling the pool-room license of George A. Crabbe. Statement

The following judgment was delivered by

MACDONALD, J. The applicant George A. Crabbe was, on the 12th day of July, 1912, granted a license to run a pool-room until the 31st day of May, 1913, subject to being suspended or forfeited, and the license was also subject from time to time during its continuance to any and all by-laws, rules and regulations in force or that may be in force in the said Corporation.

By-law No. 6 of the Corporation provides that, in cases where a license shall have been granted, and where in the opinion of the Council the licensee has allowed profanity or gambling or boisterous conduct in the licensed premises or has kept them in a neglected or insanitary condition, then, and in any such case, such licensee shall be liable to have his license revoked upon a motion of the Council carried with a three-fourths majority and such licensee shall have no claim for any unexpired portion of the said license so revoked.

On 21st October, 1912, at a regular meeting of the Council, a resolution was carried cancelling the license, and this motion is made by the licensee for an order that

1913 the resolution so passed be quashed on the following  
Judgment. grounds:  
MACDONALD, J.

1. The resolution is illegal;
2. The resolution is *ultra vires* of the Town Council;
3. The resolution does not refer to any by-law of the Town Council conferring on it the power of cancellation, nor any statutory authority authorizing it to cancel the license.

Under section 10 of an Act to amend The Municipal Act (1907) it is provided that the Council may pass a by-law for limiting the duration of and revoking any such license on grounds to be fixed by by-law.

Pursuant to this the Council passed a by-law (No. 6) which provides that, in cases where a license shall have been granted to any person or persons in respect of any billiard room, pool room, etc., and where in the opinion of the Council the licensee has allowed profanity or gambling or boisterous conduct in the licensed premises or has kept them in a neglected or insanitary condition, or has been convicted more than three times of an infraction of this or any other by-law which may in future be in force in the town of Swan River, then in all such cases and in any such case such licensee of such billiard room, pool room, etc., shall be liable to have his license revoked upon a motion of the Council carried with a three-fourths majority in that behalf.

The license granted the applicant was issued subject to any and all by-laws then, or thereafter to be, in force in the said Corporation respecting the same.

By-law No. 6 was then in force and in his application for license such application is made subject to such by-law.

From the material before me it is evident that the Council at its meeting of the 21st October, 1912, fully discussed the license in question and were unanimously of



the opinion that the licensee violated the by-law under which his license had been granted by allowing profanity and boisterous conduct in the premises licensed by such pool room license.

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J.

There is nothing to suggest that the Council acted arbitrarily or otherwise than with a *bona fide* desire for the peace and good government of the corporation, and, in my opinion, they acted strictly within their legal rights.

It is urged that the applicant was condemned unheard and that the opinion of the Council can be formed only after a judicial hearing where the applicant has a right to be heard. I do not consider this objection seriously. Swan River is a small town and a pool room one of the principal loitering places and one that may very quickly become notoriously objectionable, and the members of the Council, I am satisfied, if they did not have a knowledge from personal observation, acted on sufficient grounds to justify their action.

The further objection is that there was not a three-fourths majority in favor of the resolution, but, from the affidavits filed, they were unanimously in favor of it; but, through a mistaken idea that the majority voting must not exceed three-fourths, one member of the Council, who favored the resolution, voted against it.

The motion must be dismissed with costs.

The applicant Crabbe appealed.

*H. W. Whittle, K.C., and H. S. Scarth* for appellant, Crabbe, cited *Scott v. Pilliner*, [1904] 2 K.B. 858; *Strickland v. Hayes*, [1896] 1 Q.B. 290; *Bonanza v. The King*, 10 S.C.R. 281; *Sudbury v. Bidgood*, 13 O.W.R. 1094; *Winnipeg v. Brock*, 20 M.R. 675, and *Ste. Agathe v. Reid*, 26 Que. R.S.C. 379.

*S. J. Rothwell* for respondents cited *Duncan v. Midland*, 16 O.L.R. 132, 135; *Cyc.* vol. 15, p. 389; *Common-*

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Argument. *wealth v. Kinsley*, 133 Mass. 578; *Wiggins v. Chicago*, 68 Ill. 372; *Dinnick v. McCallum*, 26 O.L.R. 551, 560; *Foster v. Raleigh*, 22 O.L.R. 26; *Beauvais v. Montreal*, 42 S.C.R. 216; *Caswell v. South Norfolk*, 15 M.R. 620, 623; *Re Cloutier*, 11 M.R. 220; *Campbell v. Stafford*, 14 O.L.R. 184; *Fisher v. Carman*, 16 M.R. 560; *Kelly v. Winnipeg*, 12 M.R. 87; *Esquimault v. Victoria*, 24 C.L.T. 105; *Wright v. Tremblay*, 12 Q.R. K.B. 366, and *Pembroke v. Can. Cen. Ry.* 3 O.R. 508.

CAMERON, J.A. The license in question was issued subject to by-laws of the Council then or thereafter in force. The by-law of the Council (No. 6), set out in the judgment appealed from, had already been passed.

The resolution of the Council, cancelling the license, was passed October 21, 1912. The original motion was to quash this resolution on the grounds that it was illegal and *ultra vires*. This Mr. Justice Macdonald refused to do, and dismissed the motion. This appeal is taken against his decision, both on the original and additional grounds of objection to the resolution, and on the ground that the by-law does not comply with the provisions of sub-section (a) of section 10, chapter 27, Statutes of Manitoba, 1907. On the argument the appellant took further grounds of objection not strictly indicated in his notice of appeal.

The principles on which such by-laws should be construed by the Courts are set forth in numerous cases. Lord Russell of Killowen said, in *Kruse v. Johnson*, [1898] 2 Q.B. 91, that such a by-law "should not be set aside as unreasonable merely because particular judges may think that it goes further than is necessary or convenient, or because it is not accompanied by qualifications or exceptions which some judges think ought to have been there. In matters which directly or mainly concern the people . . . who have the right to choose those whom they think best fitted to represent them in their

local government bodies, such representatives may be trusted to understand their own requirements better than judges." See the cases collected in *Biggar, Municipal Manual*, at p. 337. I refer also to the judgment of Mr. Justice Teetzel in *Re Dinnick v. McCallum*, 26 O.L.R. 560. It is clear that such a by-law as that before us should be supported if possible. And on consideration of its terms, and giving its words a fair construction, it appears to me that it cannot be disregarded or set aside, either as unreasonable or as discriminating in its application. And, even if the by-law were objectionable on these or similar grounds, it is by no means clear that it can be attacked in this proceeding; indeed the authorities point the other way. Nor does it seem to me that it can be effectively impeached as going beyond the authority conferred by statute. The words "in the opinion of the Council" really add no new or unauthorized term. The whole text of the by-law simply means that the members of the Council are to have an opinion in the matter, which opinion has legal effect only when expressed in the terms of a resolution or order by three-fourths of its members.

We were referred to the cases of *Scott v. Pilliner*, [1904] 2 K.B. 858, and *Strickland v. Hayes*, L.R. 1 Q.B. 296, and the argument is based thereon that the profanity or boisterous conduct mentioned in the by-law cannot be an offence unless such is, and is expressed to be, to the annoyance of others, and that therefore the by-law is too wide. But the offences in the cases referred to were such as might be committed in the streets and public places. Here they are confined to the premises. The Courts must not be too astute in finding grounds for holding by-laws invalid on such refined grounds. I would say that the by-law in question, on its face, necessarily involves the idea of profanity and boisterous conduct in presence of, and, therefore, objectionable to, others.

It is argued that the licensee was entitled to be heard

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Judgment.  
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before the Council could act on the resolution to cancel the license. But the licensee, as I have stated, took his license subject to the provisions of the statute and of the by-law, and one of the conditions of the latter was that it might be revoked on the occurrence of certain events, "upon a motion of the Council carried with a three-fourths majority." The licensee therefore accepted the license on the distinct agreement that it was revocable by the Council acting upon the grounds set out in the by-law. The presumption would be, in the absence of any evidence showing the contrary, that the Council acted in good faith, on due consideration and on grounds appearing to it to be sufficiently established. The evidence is that the Council had facts before it and acted upon them after discussion. I cannot see, therefore, that it is open to the licensee to object to the action of the Council by which he, in effect, agreed to be bound, merely because he was not given a formal notice of the time when the matter of revocation would be up for discussion. The Council is given, by the statute, wide powers, both in fixing the grounds of revocation and in acting upon them, and it cannot be said that those powers have been exceeded or abused, either in the by-law or the resolution here in question.

I cannot take seriously the objection that the resolution was not carried by the prescribed majority. Giving the words their plain and ordinary meaning, it was carried by a three-fourths majority, that is to say, by a majority consisting of three-fourths of the members of the Council.

I think the appeal must be dismissed.

HAGGART, J.A. I agree with the reasons of Mr. Justice Macdonald, who refused the applicant's motion to quash a resolution of the respondent's council, cancelling a pool-room license.

Section 640, s-s. (a), of The Municipal Act, as amended by chapter 27, section 10 (1907), Statutes of Manitoba,

is the legislative authority for the passing of by-law No. 6, which provides for the regulation of certain businesses and the granting of licenses.

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Judgment.  
HAGGART,  
J.A.

The Municipality is expressly empowered to pass by-laws "for licensing, regulating and governing" pool-rooms and "revoking any such license on grounds to be fixed by by-law" and pursuant to this authority the Council enacts (section 25 of by-law No. 6) that, where "in the opinion of the Council the licensee has allowed profanity, gambling or boisterous conduct in the licensed premises, or has kept them in a neglected or insanitary condition" \* \* \* the licensee \* \* shall be liable to have his license revoked "upon a motion of the Council carried with a three-fourths majority in that behalf."

This by-law is wide enough to cover the resolution impeached, which is as follows:

"Moved by councillor Hay, seconded by councillor Owens, that the pool-room license granted to George A. Crabbe, expiring on May 31st, A.D. 1913, be cancelled forthwith, and the clerk notify George A. Crabbe of the cancellation of the license."

As to the objection that there was no formal trial or investigation, I assume that the personnel of the Council is fairly representative of the intelligent citizenship of the town or village, and that on taking any executive or legislative action they would, as a Council or as individuals, inform themselves of the existing conditions. In a small town or village the Councillors would necessarily know the facts.

I do not agree with the applicant's construction as to the "majority." There is some ambiguity, but it is plain the intention was that the motion for revoking should be supported by three-fourths of the members of the Council.

I think the words of Lord Russell of Killowen, C.J., in *Walker v. Stretton*, 12 Times L.R. 363, (1896) are applicable to the present case, where he lays it down as a

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general rule that "The Court ought as far as possible to support by-laws made by local authorities unless it can be clearly seen that the by-law was made without jurisdiction and was unreasonable," and that judges "should not willingly pick holes in rules which deal with local matters and local requirements which the local authorities are often better able to judge of than the courts." And in a later case, *Kruse v. Johnson*, [1898] 2 Q.B. 91, the same learned Judge, after pointing out that the majority of the English cases, in which the validity of by-laws had been discussed, related to the by-laws of railway companies, dock companies and other commercial corporations, expresses the opinion that a much more liberal rule should be applied to the by-laws of representative public bodies entrusted by Parliament with legislative powers for the general good, and that such a by-law "should not be set aside as unreasonable merely because certain judges may think that it goes farther than is necessary or convenient, or because it is not accompanied by qualifications or exceptions which some judges think ought to have been there. In matters which directly or mainly concern the people \* \* \* who have the right to choose those whom they think best fitted to represent them in their local governing bodies, such representatives may be trusted to understand their own requirements better than (some) judges."

If these observations were pertinent in the old land, they apply with much stronger force in this new country where our municipal institutions are in the moulding and where legal and professional assistance is not always available.

The appeal should be dismissed with costs.

PERDUE, J.A., concurred.

*Appeal dismissed.*

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## MCCONNELL V. WINNIPEG ELECTRIC RY. CO.

Before THE REFEREE.

*Jury trial—Practice—King's Bench Act. s 59 (b)—Election of forum.*

Although the action is such that, if an application had been made at the proper time for an order under sub-section (b) of section 59 of the King's Bench Act, for trial by a jury, it would probably have been granted, yet such order should be refused in a case where the plaintiff has already set down the case to be tried by a Judge without a jury.

DECIDED: 10th February, 1913.

APPLICATION by plaintiff for an order, under sub-section (b) of section 59 of the King's Bench Act, that the action should be tried by a jury. Statement

The nature of the issues to be tried was such that the order would probably have been granted if the application had been made at a proper time, but it appeared that the plaintiff had previously set the case down for trial by a Judge without a jury and that it had been struck off the list with costs of the day because the plaintiff was not ready to proceed.

*J. F. Davidson* for plaintiff.*R. D. Guy* for defendants.

THE REFEREE. I am of opinion that the plaintiff has chosen his forum and cannot now succeed in his application for a jury trial.

Motion dismissed with costs.

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## COURT OF APPEAL.

*Re CLUB LAURIER.*

Before PERDUE, CAMERON and HAGGART, J.J.A.

*Liquor License Act—Club—Permit to keep liquor for use of members—**Mandamus—Powers of License Commissioners—Discretion.*

Section 10 of chapter 31 of Edw. VII, amending the Liquor License Act, provides that the License Commissioners may, under certain conditions, grant permission to a club to keep liquor on the club premises for the use of its members on payment of the prescribed fee.

*Held*, that the exercise of this power by the License Commissioners is discretionary and not obligatory, although the club applying for such permission may have fulfilled the statutory requirements, and that, the Commissioners having exercised their discretion by refusing the permission, the Court should not interfere by *mandamus* to compel them to grant the permission, except under special circumstances which had not been shown to exist in this case.

DECIDED: 24th February, 1913.

**Statement** By special leave granted to proceed by motion instead of by action, a motion was made on behalf of Club Laurier for an order for a mandamus commanding the License Commissioners of License District No. 4, according to the Liquor License Act, to grant to Club Laurier the permission in writing mentioned in section 10 of chap. 31 of 9 Edw. VII., to keep liquor on the club premises for the use of the members thereof, on the ground amongst others that the License Commissioners were bound by law to grant such permission, and that they had acted unfairly, unjudicially, discriminately and arbitrarily in refusing such permission to said Club Laurier, and that they had neglected and refused to do their duty contrary to said section 10.

METCALFE, J., dismissed the motion with costs, holding that the matter was one in which certain powers had been given to the License Commissioners by the Legislature; that, the Commissioners having exercised their discretion, the Court ought not to interfere except under special circumstances. No special circumstances having been proved in the present case, the application was dismissed.

Club Laurier appealed.



*Albert Dubuc* for applicant, appellant, cited *Haslem v. Schnarr*, 30 O.R. 89; *King v. Bonnar*, 14 M.R. 481, and *Reg. v. Crothers*, 11 M.R. 567. 1913  
Argument.

*H. W. Whittle, K.C.*, and *H. Philipps* for respondents, the License Commissioners, cited *King v. Registrar of Companies*, [1912] 3 K.B. 23; *Grand Junction Waterworks Co. v. Hampton*, [1898] 2 Ch. 331, 346; *Jackson v. Clark*, 20 C.L.T. 42; *Baxter v. Hesson*, 12 U.C.R. 139; *Rodd v. Essex*, 44 S.C.R. 144; *Reg. v. Cotham*, [1898] 1 Q.B. 806; *Pistoni v. Depenti*, 8 East. L.R. 191; *Sharp v. Wakefield*, [1891] A.C. 179; *Griffiths v. Justices of Lancashire*, 3 Times L.R. 672; *Smith v. Shann*, [1898] 2 Q.B. 347; *Ex parte Gorman*, [1894] A.C. 28, and *Rex v. Kingston*, 86 L.T. 589.

THE COURT dismissed the appeal with costs.

### COURT OF APPEAL.

#### COX V. CANADIAN BANK OF COMMERCE.

Before PERDUE, CAMERON and HAGGART, J.J.A.

*Costs—Counterclaim—7 & 8 Edw. VII, c. 12, s. 1.*

When there is a claim and a counterclaim, the counterclaim is to be regarded, for the purposes of the taxation of costs, as a separate action: *Les Soeurs v. Forrest*, 20 M.R. 301.

In taxing the costs of a counterclaim, when the defendant has succeeded in respect of both the claim and the counterclaim, he should receive not only his costs of opposing the plaintiff's claim, but also such additional costs as were incurred by reason of the counterclaim: *Saner v. Bilton*, (1879) 11 Ch. D. 416; *Atlas v. Miller*, [1898] 2 Q. B. 500, and *Fox v. Central Silkstone Co.*, [1912] 2 K. B. 597.

*Held*, that in this case the discretion of the taxing officer in allowing counsel fees of \$190 in respect of the counterclaim should not be interfered with.

*Per* PERDUE, J.A. In taxing the costs of a counterclaim the taxing officer should not take into account the fact that there has been a reduction of the defendant's taxable costs of defending the plaintiff's action by reason of the statutory limit fixed by section 1 of chapter 12 of 7 & 8 Edw. VII.

DECIDED: 24th February, 1913.

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Statement.

APPEAL on behalf of the plaintiff from a taxation by the senior taxing officer of this Court, at the conclusion of litigation between the plaintiff and defendant, which resulted in a dismissal of the action with costs and an allowance of the defendant's counterclaim on a note for \$2,000 with costs. The case was finally decided by the Supreme Court of Canada (46 S.C.R. 564), affirming the judgment of the Court of Appeal, 21 M.R. 1, which had reversed the judgment of Mathers, C.J., at the trial.

The following judgment was delivered by

GALT, J. The pleadings have been referred to by counsel on both sides, and it appears to me that several questions were raised in the counterclaim which would not necessarily pertain to the plaintiff's claim. It is very difficult to say, without having the evidence before one, how much of the evidence given at the trial, which lasted two and a half days, appertained to the claim and how much to the counterclaim; but I am quite satisfied that at least a considerable portion of the evidence must have related to the issues set up by the counterclaim.

It has been held in *Les Soeurs v. Forrest*, 20 M.R. 301, that for the purpose of taxation a counterclaim must be regarded as a separate action.

In the present instance the defendants, who succeeded, brought in two bills of costs for taxation before the senior taxing officer. These bills of costs are before me and I see that, in the bill of costs of the defence, the bill submitted for taxation amounted to \$595.50. This included senior counsel fee, 2½ days, \$300, junior counsel fee, same time, \$200, and some small items of disbursements. Under the statute only \$300 and disbursements can be allowed, and the taxing officer has allowed the sum of \$300, but does not in any way segregate the

items to which he applies it, so that about \$250 has been taxed off the bill by reason of the statutory provision.

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Judgment.  
GALT,  
J.

In the case of the bill of costs of the counterclaim, which contains the only fees objected to, the senior taxing officer has allowed the senior counsel fee of \$60 and junior counsel fee of \$30 at the trial. It appears to me impossible to say that the taxing officer erred in the discretion he exercised in allowing these two fees by way of counsel fees on the counterclaim, as it was entirely his duty to satisfy himself as to the work performed by counsel in respect of both claim and counterclaim, and I cannot but think that, where the successful party was obliged to lose so large a sum as \$250 or thereabouts by virtue of the statute applicable to the taxation of the claim, the taxing officer might well take this into account in dealing with the costs of the counterclaim. He might have taken this amount off the counsel fees alone.

It has been agreed by the parties that any ruling of mine which applies to the allowance of these fees in the King's Bench is equally applicable to the fees allowed in the Court of Appeal. Consequently I decline to interfere with the allowance of the counsel fees that were allowed by the taxing officer in the Court of Appeal.

I, therefore, dismiss this appeal with costs.

Plaintiff appealed.

*J. Galloway* for plaintiff, appellant, cited *Saner v. Bilton*, 11 Ch. D. 419; *Atlas v. Miller*, [1898] 2 Q.B. 504; *Fox v. Central*, [1912] 2 K.B. 597; *Baynes v. Bromley*, 6 Q.B.D. 691, and *Ward v. Morse*, 23 Ch. D. 377.

*C. H. Locke* for defendants, respondents, cited *Baynes v. Bromley*, 6 Q.B.D. 691; *Les Soeurs v. Forrest*, 20 M.R. 301, and *Amon v. Bobbit*, 22 Q.B.D. 543.

PERDUE, J.A. This is an appeal from an order of Galt, J., affirming the taxation of the costs allowed to the defendant by the senior taxing officer.

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Judgment. The decision of the Court under which the taxation took place is reported in 21 M.R. 1, affirmed 46 S.C.R. 564.

PERDUE,  
J.A.

The suit was brought to compel the return of a note made by The Finch Co., Limited, and indorsed by the plaintiffs as sureties, on the ground that the note had been handed to the Bank for discount only, that the Bank had refused to discount the note and had improperly retained it. The defendants denied that the note had been left with them for discount and alleged that it was lodged with and held by them as collateral security for past and future advances to The Finch Co. The Bank counterclaimed for the full amount of the note. The plaintiffs filed a defence to the counterclaim, denying that the note had been negotiated to the Bank or that the Bank was the holder in due course. The plaintiffs further claimed that there was not, at the commencement of the suit, any indebtedness owing to the defendants from The Finch Co.

The case was tried before Mathers, C.J., who gave judgment in favor of the plaintiffs and dismissed the defendants' counterclaim with costs both of the main action and of the counterclaim. On appeal to the Court of Appeal this judgment was reversed, the plaintiff's action was dismissed with costs, the counterclaim was allowed with costs and a judgment entered for the Bank against the plaintiffs for the full amount of the note. This judgment was affirmed on appeal to the Supreme Court of Canada.

The objection to the taxing officer's ruling applies wholly to the fees allowed by him in respect of the counterclaim at the trial and in the Court of Appeal. He allowed \$60 to senior counsel and \$30 to junior counsel at the trial, and \$100 in the Court of Appeal, all in respect of the counterclaim.

The plaintiffs' contention is that the costs were not

substantially increased by reason of the issues raised by the counterclaim, and that nothing more than a nominal fee should have been allowed at each hearing.

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Judgment.  
PERDUE,  
J.A.

Where there is a claim and a counterclaim, it has already been decided by this Court that, for the purposes of taxation, the counterclaim is to be regarded as a separate action: *Les Soeurs v. Forrest*, 20 M.R. 301.

In taxing the costs of a counterclaim where the defendant has succeeded both in respect of the plaintiff's claim and of the counterclaim, the defendant, in addition to receiving the costs of the plaintiff's action, should receive such additional costs as were incurred by reason of the counterclaim: *Saner v. Bilton*, 11 Ch.D. 416; *Atlas v. Miller*, [1898] 2 Q.B. 500; *Fox v. Central Silkstone Co.*, [1912] 2 K.B. 597. If the work in respect of which a fee on a counterclaim is claimed related both to the claim and the counterclaim, the fee should be apportioned between the two.

In the present case the plaintiffs denied that there was any sum due to the defendants from The Finch Co. when the suit was commenced, and claimed that, therefore, the principal debt having been paid, the defendants had no claim upon the note in question. They also contended that, if the note had been lodged with the Bank as collateral security, it was only intended to apply to trade discounts and not to apply generally to the indebtedness of The Finch Co. Both of these contentions arose directly under the defendants' counterclaim. Considerable evidence was directed to the elucidation of these two points and a very considerable portion of the argument, at all events in the Court of Appeal, was directed to these points. It would, therefore, appear that the counterclaim and the defence thereto raised substantial issues, which were quite separate and distinct from the issues raised by the plaintiffs' statement of claim. I am,

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Judgment.  
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J.A.

therefore, of opinion that the taxing officer was justified in allowing the fees complained of.

While in full accordance with the conclusion at which Galt, J., arrived, I would, with great respect, differ from the view he appears to take that, because a successful party loses a large amount on his bill by reason of the statutory limit being applied, the taxing officer might take that into account in dealing with the costs of a counterclaim in the same action. I think the taxing officer must be guided by the principles referred to in the above cases, and allow only such costs in respect of the counterclaim as were incurred by reason of it, and were not incurred by reason of the plaintiffs' claim.

The appeal will be dismissed with costs.

HAGGART, J.A. The plaintiffs, having failed in the original action, pay the general costs of the action, and the defendants, having succeeded on their counterclaim, should have additional costs so far as they have been increased by reason of that counterclaim. This is the principle laid down in *Saner v. Bilton*, 11 Ch. D. 416, by Mr. Justice Fry, after consultation with the taxing masters, and which was followed by the Court of Appeal in *Atlas Metal Co. v. Miller*, [1898] 2 Q.B. 500.

The plaintiffs contend that the counterclaim involved no matters of law or of fact different from those involved in the claim, that no extra work was entailed, no increased amount of costs was incurred by reason of the counterclaim, and that the counterclaim was in effect disposed of by the disposition of the claim.

A perusal of the proceedings does not sustain this contention. It is plain that there were additional issues on the record and additional evidence was necessary and was given. It was for the officer to ascertain what additional costs were incurred and, as he proceeded upon the correct principle, I would hesitate before interfering with his finding. I think \$190 for the extra costs for

the trial and the appeal is not excessive. I would dismiss the appeal against the judgment of Mr. Justice Galt, who affirmed the decision of the taxing master.

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Judgment.  
HAGGART,  
J.A.

CAMERON, J.A., concurred.

*Appeal dismissed.*

### SMITH V. SIMPSON.

Before PRENDERGAST, J.

*Practice—King's Bench Act, Rule 615—Summary judgment on admission in pleadings—Right to proceed with action.*

The statement of defence in this action admitted that a certain sum of money was due to the plaintiff in respect of his claim and was pleaded in answer to the whole claim which was for a larger amount. Plaintiff then obtained an order, under Rule 615 of the King's Bench Act, for final judgment for the amount admitted.

*Held*, that the action was at an end, and the plaintiff could not proceed to examine one of the defendants for discovery.

*United Telephone Co. v. Donohoe*, (1886) 31 Ch. D. 399, and *Andrews v. Patriotic Assurance Co.* (1886) 18 L. R. Ir. 115, followed.

*Kelly v. Kelly*, (1908) 18 M. R. 362, distinguished.

DECIDED: 11th February, 1913.

### APPEAL from the Referee.

Statement

Application on behalf of the plaintiff to compel the defendant Corelli to attend for examination for discovery. The motion was opposed on the ground that the action was at an end, judgment having been obtained under an order made by the Referee on the 3rd of July, 1912, on the application of the plaintiff.

THE REFEREE. The plaintiff, on the 3rd of July, moved for an order for judgment, under Rule 615 of the King's Bench Act, upon the admissions in the defendants' pleadings, and I made the order of that date accordingly. When this order was made nothing was said by

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Judgment.  
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REFEREE.

counsel on either side with reference to the plaintiff proceeding for any further relief or attempting to go on and collect the full amount of the plaintiff's claim, and the plaintiff did not ask to have reserved any right to do so, whilst the defendants' counsel did not suggest that the order for judgment would be in the nature of a final judgment, or prevent the plaintiff from so proceeding further. Under these circumstances I was under the impression, at the time of making the order, that the plaintiff could proceed to endeavor to collect the balance of his claim in this action, and I made the costs of the order costs to the plaintiff in the cause in any event.

I am now satisfied, however, on the authority of the cases cited by the defendant's counsel: *Demorest v. Midland*, 10 P.R. 640; *United Telephone Co. v. Donohoe*, 31 Ch. D. 399, and *Andrews v. Patriotic Assurance Co.*, 18 L.R. Ir. 115, that the plaintiff is precluded by the course taken and by the pleadings from proceeding further in the action, and that the defendant's contention that the action is at an end is one to which effect must be given, and I, therefore, refuse the order and dismiss the application with costs.

Plaintiff appealed.

*H. A. Bergman* for plaintiff.

*W. L. McLaws* for defendant.

PRENDERGAST, J. This is an application by way of appeal from an order of the Referee dismissing the plaintiff's application to compel one of the officers of the defendant Company to attend an examination for discovery.

The facts are fully set out in the considered judgment of the learned Referee, who gave effect to the objection raised that the action is at an end.

In *Kelly v. Kelly*, 18 M.R. 362, the defence did not extend to all, but only to some of the lands of which par-



tition was sought by the action; it was not then an entire defence, which distinguishes it from the present case.

I have my doubts whether the decision in *Demorest v. Midland Ry. Co.*, 10 P.R. 640, should apply here. But I think that the cases of *United Telephone Co. v. Donohoe*, 31 Ch. D. 399, and *Andrews v. Patriotic Assurance Co.*, 18 L.R. Ir. 115, on which the Referee bases his decision, were well in point.

The appeal should be dismissed with costs.

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# COURT OF APPEAL.

## GADSDEN V. BENNETTO AND WELLBAND.

Before HOWELL, C.J.M., PERDUE, CAMERON and HAGGART, J.J.A.

*Company—Directors buying shares from other shareholders—Fraud—Concealment of material fact affecting value of shares—Ownership of shares—Voidable transaction—Amendment—Ratification.*

The defendants and another director of a company, formed to acquire and sell a single tract of land, were appointed by the directors a committee "to bring in a proposal for disposing of the lands and shares". This committee negotiated a sale at a price which made the shares worth about \$2,000 each. Whereupon the defendants proceeded to purchase the shares held by the plaintiff and others at \$1,370 per share without disclosing the advantageous sale they had made, and the plaintiff sold and transferred his shares to the defendants in ignorance of such sale.

*Held*, that the position of the members of the committee was very different from that of ordinary directors of a company as regards their fiduciary relations to the shareholders, and that they were bound to inform the shareholders about the sale if they proposed to buy their shares from them; and that the defendants had been guilty of such fraudulent concealment as to make their purchase from the plaintiff voidable.

*Walsham v. Stainton*, (1863) 1 De G. J. & S. 678; *Hyatt v. Allen*, (1912) 8 D.L.R. 79, and *Re Imperial Land Co.*, (1876) 4 Ch. D., 566, followed.

*Percival v. Wright*, [1902] 2 Ch. 421, distinguished.

This was an issue directed in the winding-up of the company to try the question of the *ownership* of the shares in dispute and it was contended that, as the sale had been completed and the shares transferred, even if the sale was induced by fraud, it was not void

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but only voidable, and the *ownership* was still in the transferees, and the issue must be decided in their favor.

*Held*, that the form of the issue should be amended, if necessary, to enable the Court to enter a verdict that the shares were the property of the plaintiff subject to his liability to account for what he had received for them.

*Held*, also, that the evidence failed to show that the plaintiff had elected to affirm the transaction after he became aware of the fraud.

DECIDED: 17th March, 1913.

**Statement.**

THIS was an interpleader issue to determine the ownership of five shares of stock in the Kootenay Valley Fruit Lands Co. The issue was tried before Mathers, C.J. K.B., who decided in favor of the defendants Bennetto and Wellband. From that decision the present appeal was brought.

A. B. Hudson for plaintiff, appellant, cited *Percival v. Wright*, [1902] 2 Ch. 421; *Walsham v. Stainton*, 1 De G. J. & S. 678; *Carpenter v. Danforth*, 52 Barb. (N.Y.) 581, and *Hyatt v. Allen*, 8 D.L.R. 79.

C. P. Fullerton, K.C., and J. P. Foley for both defendants, respondents, cited *Wellband v. Walker*, 20 M.R. 510; *Kerr on Fraud*, 445, and *Am. & Eng. Ann. Cas.*, vol. 2, p. 873-876.

HOWELL, C.J.M. The Company was incorporated simply to purchase, hold and sell one tract of land. Bennetto became managing director and treasurer and continued up to the liquidation to hold these offices.

The defendant Wellband was vice-president of the Company, and while these defendants held these positions a resolution of the Company was passed creating a committee consisting of the defendants and A. McCutcheon "to bring in a proposal for disposing of the lands and shares." Acting on this resolution, Bennetto, with the assistance of McLaws, who was acting as solicitor for the Company, procured one Cooper to enter into a binding agreement to purchase the lands for \$80,000 and further to pay Bennetto and McLaws a secret commission of \$18,000. After this binding agreement was

entered into the defendants arranged with the solicitor to purchase and did purchase the stock in question from Walker, a shareholder, secreting from him that the above sale had been made, and procured a transfer, paying at the rate of \$1,370 per share, about one-half of what each share was worth on the basis of the above sale.

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The facts found by the learned Chief Justice should not, in my view, be disturbed.

With great deference, I do not think that the law laid down in *Percival v. Wright*, [1902] 2 Ch. 421, and the American case of *Carpenter v. Danforth*, 52 Barb. 581, should govern this case. The two defendants were members of the committee appointed to sell this land and after a sale was made, by suppressing the facts, they buy through McLaws, but really for themselves, this stock. It is well to observe that they were authorized to sell the *land and shares*; probably it was thought that, as selling the land was really a winding up of the Company, the purchaser might require to get all the stock in order really to make title. The defendants, with McLaws, conspired together to suppress the facts and get the shareholders' property.

It would be strange if, in such a flagrant case of fraud, the Court could not grant relief and I see no necessity for citing authorities. The very recent case of *Hyatt v. Allen*, 8 D.L.R. 79, is quite applicable and justifies granting relief to the plaintiff.

The defendants claim, however, that Walker subsequently was informed of the fraud and that they bought him off and got a full release from him by giving him a portion of the purchase price to which he was entitled. Walker clearly had no right or power to make a settlement with the defendants for the shares which he did not own and which he simply held in trust, to the knowledge of McLaws, and therefore to their knowledge.

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In 1908 Walker assigned all the shares which stood in his name to the defendants and his release in 1911 did not give any further title. He had no authority to give a release of this fraud as to the shares which were not his.

The onus of proof of this issue is on the defendants and, if the defendants fully explained all their frauds to Walker and he acted and consented to take only part of what he was entitled to, perhaps he is bound, but I cannot see how he can so bind the plaintiff. It cannot be said that he was the plaintiff's agent to compromise this fraud and take from trustees less than the sum to which the plaintiff is entitled.

There is another view of the case which might justify relief. The general manager and treasurer of the Company with the vice-president procured a sale of the entire assets of the Company in the performance of the business of the Company, which would cause a winding up thereof, and, by suppressing all the facts, they secretly, in the name of another, bought in the stock of shareholders. Is it not a case of a trustee suppressing facts and buying in secretly the rights of the *cestui que trust*?

The fraudulent action of Bennetto in securing \$18,000 commission, and in agreeing to divide this with the person he employed secretly to purchase the stock, makes it difficult for a person to look at the whole transaction calmly.

The appeal is allowed with costs and the case disposed of in accordance with the details set forth in the judgment of Mr. Justice Perdue.

PERDUE, J.A. No difficulty arises in regard to findings of fact in this case, as the appellant's counsel did not object to the Chief Justice's findings in that regard. It is only necessary to give a brief recapitulation of the main facts in the case.

The Kootenay Valley Fruit Lands Co. was incorpor-

ated for a very limited purpose, namely, to acquire and dispose of a single tract of fruit land in British Columbia. Apparently, when this single venture should be concluded, the whole object of, and reason for, the Company's existence would be achieved.

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The capital of the Company was \$40,000, divided into forty shares of \$1,000 each, all of which had been allotted. Gadsden was the owner of two of these shares. The Company had acquired the tract of land above mentioned in the spring of 1908, and its purpose was to dispose of this land at a profit. At this time Bennetto was the managing director and treasurer of the Company. In the month of May he was in negotiation with one James Cooper of Saginaw, Michigan, for the sale of the Company's lands to the latter, nominally for the sum of \$80,000, but actually for the sum of \$98,000, the difference, \$18,000, to be retained by Bennetto as a secret profit for himself.

On 20th May, 1908, the directors passed a resolution that, if an offer of \$80,000 and liabilities were made, it should be accepted, that is to say \$80,000 over and above the Company's liabilities in respect of their property. Either on that day or the next day the directors passed the following resolution: "That a committee be composed of Messrs. I. Bennetto, C. Wellband and A. N. McCutcheon to bring in a proposal for disposing of the lands and shares." This committee was composed of three directors, two of whom were Bennetto, the managing director and treasurer, and Wellband, the vice-president. The purpose of the committee was to find and bring in a proposal, not only for disposing of the land, but also of the shares.

According to the finding of the Chief Justice, Bennetto, after the offer from Cooper had been received, conceived the design of buying the shares of the minority faction of the shareholders, that is to say, the fac-

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tion opposed to Bennetto and his associates. For this purpose he entered into a partnership with the defendant Wellband to carry out this scheme. They employed McLaws, the legal representative of the Company, to buy the shares, agreeing to give him a share of the profits. Sampson Walker, one of the minority shareholders, was approached by McLaws and Walker agreed to sell his shares at the price of \$1,370 per share. Walker communicated with the plaintiff Gadsden, and the latter agreed to accept the same price for his shares. Gadsden then transferred the two shares he owned to Walker for the purpose of collection only. At this time neither Gadsden nor Walker, as the Chief Justice finds, was aware of the sale negotiated by Bennetto. Upon this sale going through, the shares would, on the basis of the purchase price of the land being \$80,000, be worth \$2,000 each.

Upon receiving the transfer of Gadsden's shares, Walker entered into a written agreement with McLaws, dated 26th May, 1908, for the sale to McLaws of twelve shares, two of which were Gadsden's and three of which were held by Walker as mortgagee only, one Teetzel being the owner of the equity of redemption. The total price was \$16,200, payable in instalments. At the time of the sale McLaws was aware that Walker held Gadsden's shares as trustee only.

The sale of the Company's land to Cooper was carried out and confirmed at a meeting of shareholders held on 13th August, 1908. Cooper agreed to pay the purchase price of \$80,000 as follows: \$5,000 in cash and the balance in one, two and three years, with interest at six per cent per annum. After the cash payment had been made by him a resolution of the directors was passed authorizing the treasurer to divide it amongst the shareholders and to "collect and pay out" the balance of \$75,000 as collected.

In November, 1908, the plaintiff purchased from Teetzel for \$1,000 the equity of redemption of the latter in the three shares which Walker held as mortgagee. The learned trial Judge finds that this purchase was made by the plaintiff for his own benefit, but that he bought them for the purpose of selling them to McLaws for \$1,370 per share.

It is clear to me that any information received by the members of the committee as to the prices that could be obtained either for the land or for the shares would be received in a fiduciary capacity, not only for the Company, but for the individual shareholders. If the intending purchaser decided that, instead of merely buying the land, he would buy the shares at a certain price per share, the committee was bound to disclose to the shareholders how much per share the purchaser was willing to give. It appears from the evidence that the negotiations with Cooper at one time assumed the form of a proposal to acquire the shares, but it resulted eventually in a purchase of the property.

The position of the members of the committee in this case is very different from that of ordinary directors of a company as regards their fiduciary relations, and is quite distinguishable from *Percival v. Wright*, [1902] 2 Ch. 421. In the present case the committee were acting outside the ordinary duties of directors, they were appointed for the purpose of securing and bringing in a proposal for disposing, not only of the land which was the property of the Company, but the shares which were the property of the individual shareholders. On any proposal being received by them which involved the acquisition of the shares, they were bound to disclose to the shareholders, the interested parties, the nature of the proposal and the price offered. If the proposal took the form of acquiring all the Company's property and leaving the shares out of account, the shareholders would be

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immediately interested in that proposal, because their shares would become worthless when the property was transferred and they could only look for reimbursement to their share of the purchase money on a distribution being made. If the committee, acting under its duties to the Company and the shareholders, secured a highly advantageous offer, they were bound to make full disclosure of the offer to the Company and the shareholders. The members of the committee were the confidential agents of the Company and the shareholders. Their concealment of Cooper's offer, which so greatly enhanced the value of the shares, with a scheme in view to buy the shares at a low price, was a breach of duty and a fraud upon the shareholders whose shares they acquired, by means of that concealment, at a price far less than their intrinsic value: *Walsham v. Stainton*, 1 De G. J. & S. 678; *Hyatt v. Allen*, 8 D.L.R. 79; *Re Imperial Land Co.*, 4 Ch. D. 566.

The learned trial Judge dealt with the case as if Bennetto and Wellband were mere directors of the Company and gave his decision upon the view that, as directors, no duty was cast upon them to make to the individual shareholders full disclosure of the negotiations that were pending with Cooper.

Without expressing any opinion as to the duty of the directors to the individual shareholders in such a case, I think the learned trial Judge quite overlooked the fact that the three members of the committee were, by reason of the resolution appointing them and by their acceptance of the duty imposed by it upon them, acting outside the scope of ordinary directors, and that a fiduciary relationship had been established between them, on the one hand, and the Company and the individual shareholders on the other. The defendants are fixed with notice through McLaws that Walker was a trustee for Gadsden as to the two shares.



The trial Judge has found that Gadsden by his subsequent conduct ratified the sale that Walker had made of the shares at \$1,370 each. But this ratification, if such there was, was made while Gadsden was ignorant of the fact that a sale of the property had been made at \$80,000, or really at \$98,000 if Bennetto's secret commission is included. I cannot find evidence to prove that Teetzel knew the facts of the sale when he sold to Gadsden. Gadsden is in the position of Teetzel and is the owner of the three shares subject to the lien of Walker for the amount of the loan. I do not think that the defendants, who were engaged in the perpetration of a fraud, can avail themselves of the equitable doctrine of purchasers for value without notice. A formal release was given by Walker to the defendants on 15th September, 1911, but he had no authority to bind Gadsden by this release, either in respect of the two shares or the Teetzel shares.

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The trial Judge called attention to the defective way in which the issue has been framed. The contest between the parties took the form of a suit in equity to set aside the sale of the shares to the defendants as having been induced by fraud in the circumstances shown. If he had taken the view that the plaintiff was entitled to succeed, he would have been willing to amend the issue so that the real question could be determined. Both the questions in the issue should be answered as follows:

In the circumstances disclosed in the evidence the shares referred to in both said questions are the property of the plaintiff James Gadsden as against the defendants Israel Bennetto and Charles Wellband.

The Judge, who will deal with the questions reserved until after the trial of the issue, can work out the amount of the credit that is to be allowed by Gadsden in respect of the shares for money already received by him and by Walker from the defendants, and will treat the money in

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court as representing the shares and dispose of it accordingly.

The appeal should be allowed with costs; the judgment of Mathers, C.J., should be reversed and the questions in the issue answered as above, and the defendants should be ordered to pay the costs of the issue.

CAMERON, J.A. Upon the findings of the Chief Justice, I cannot resist the conclusion that the appellant is entitled to succeed. The facts here are very different from those set out in the cases referred to in the judgment appealed from. When the officers of a company combine to dispose of all its property (the holding of which was the sole object of its existence) at a secret profit to themselves, the acquisition of shares by them from shareholders who are in ignorance of the subterranean facts of the sale, cannot surely be upheld by the Courts. The considerations which affect the transfer by Gadsden of the shares, originally his own, affect also the shares acquired by him from Teetzel. Had Teetzel, before he finally disposed of his interest in his shares, with full knowledge of the material facts, elected to ratify the action of the defendants and discharge them from any liability, the situation would be different, but nothing of the kind is shown.

It would be difficult to say that the so-called release of Sept. 15, executed by Walker in favor of Wellband and Bennetto, would have been binding on him had he chosen to dispute it. He said he never read the part of the document relating to the secret commission. At any rate his action could in no wise affect Gadsden, who knew nothing of it. As to the Teetzel shares, the equity in these had been acquired by Gadsden in November, 1908. The learned Chief Justice finds that Gadsden "bought the equity in these Teetzel shares after the amount of the equity had been figured and stated to him by Walker."

No doubt the burden of establishing affirmation with knowledge rests on the defendants here, and "the evidence fails to show that either Walker or Gadsden had elected to confirm the transaction with knowledge of the fraud."

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The answers to the questions submitted in the order for trial in this matter must, in my opinion, be that the ownership of share certificates Nos. 24 and 16 is in the appellant James Gadsden as against Israel Bennetto and Charles Wellband. I concur in the disposition of the case and of the costs of the appeal and the issue in the manner stated by Mr. Justice Perdue in his judgment.

HAGGART, J.A., concurred.

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#### COURT OF APPEAL.

#### STITT V. CANADIAN NORTHERN RY. CO.

Before HOWELL, C.J.M., PERDUE, CAMERON and HAGGART, J.J.A.

*Railways—Fences—Animals killed on track—Cattle guards—Railway Act, R.S.C. 1906, c. 37, ss. 254, 294—Animals at large through negligence of owner.*

The evidence showed that the plaintiff's horse was in a pasture field adjoining, on one side, the right of way of the railway and, on the other side, the road allowance crossing the railway, and it got over the road allowance on to another quarter section where it was killed either, (a) through a defect in the fence along the right of way or (b) over that fence or through or over the other fencing on the field in which it was pasturing.

*Held*, that, in case (a) the defendants would be liable under section 254 of the Railway Act, and that, in case (b), the horse was "at large" on the road allowance before it reached the place where it was killed and the defendants would be liable under sub-section 4 of section 294 of the Act, unless negligence on the part of the owner was proved.

The statement of claim alleged that there were no cattle guards at the crossing of the road allowance as required by section 254 of the Railway Act and that the plaintiff's horse was killed through the negligence of the defendants, but no other ground of relief, and the trial Judge found that, without amendment which plaintiff's counsel

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refused to ask for, the plaintiff could not recover, as he had not proved that the horse got at large only by reason of the absence of cattle guards, and he non-suited the plaintiff.

*Held*, that the non-suit was wrong as the plaintiff had made out a case on the evidence and the pleading should have been amended to fit it; but, that, as the defendants had given no evidence, there should be a new trial if desired by them. Costs of the appeal to plaintiff in any event.

DECIDED: 17th March, 1913.

Statement

THIS action was brought by the plaintiff to recover the value of a horse killed by an engine of the defendants.

At the trial before Judge Mickle, a non-suit was entered and the plaintiff appealed.

*G. A. Eakins* for plaintiff.

*P. A. Macdonald* for defendants.

CAMERON, J.A. This action was brought by the plaintiff to recover the value of a horse killed by an engine of the defendants. The diagram filed, Ex. B, shows the plaintiff's quarter section, on a part of which the horse had been at pasture, and the quarter section, diagonally across the road allowance, where the accident occurred. There was some evidence of a defect in the fence along the right of way crossing the plaintiff's property, and evidence also of absence of cattle-guards where the right of way crossed the road allowance.

There is, in the statement of claim, an allegation of the absence of cattle-guards at the crossing of the road by the railway, and on this the learned County Court Judge placed great stress, holding that the plaintiff was bound thereby and was not in a position to rely upon the evidence as to a defective fence. "The plaintiff," he says, "is not entitled to recover \* \* \* except upon the cause of action which he has particularized \* \* \* and the fact that his evidence might support a cause of action not set up and different from that which he has particularized does not entitle him to recover." And, as the plaintiff's solicitor refused to amend, the action was

dismissed. But, if the statement of claim is looked at closely, it does not allege specifically that the loss of the horse was due to the absence of cattle-guards but, generally, that it was due to the negligence of the defendant. In any event, if the second clause of the statement of claim were disregarded altogether, as it might be, or taken as a superfluous assertion merely, the statement of claim sufficiently discloses a cause of action.

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The horse came on the quarter section where it was killed either, (a) through a defect in the fence along the right of way, or (b) over that fence or through or over the other fencing of the field in which it was pasturing, in which case (b) it was clearly at large on the road allowance before it reached the quarter section where it was killed. In any of these events the defendants were, on the evidence, liable under either section 254 or 294.

A non-suit was moved for at the conclusion of the plaintiff's case, which the learned trial Judge refused to grant, and the defendant's counsel stated that he had no witnesses to call. The value of the horse seems to be well established at \$150 by the evidence.

It may be that the defendants were misled by the allegations in the statement of claim, and, therefore, refrained from calling evidence bearing upon the facts. If such be the case, I think an opportunity should be given them to call any evidence they may feel advised. I would set aside the judgment of non-suit and grant a new trial, if the defendants so elect, within ten days. Otherwise there should be a judgment for the plaintiff for \$150 with costs of the trial and of this appeal. If a new trial be had the plaintiff must have the costs of this appeal in any event of the cause, and the costs of the former trial must abide the event.

HAGGART, J.A. At the close of the plaintiff's case the defendants moved for a nonsuit, which the trial Judge then refused. The defendants' counsel then stated he had

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no witnesses. There are no conflicting statements, nor is there any contradictory evidence. This Court can, therefore, draw its own conclusions. The pasture field from which the horse in question escaped was bounded on one side by the line of railway and on two other sides by the highway. There was evidence given at the trial that the fence along the railway was defective, but this defect was not noticed until two months after the time of the accident, and the learned Judge thinks he was asked to assume too much to hold that the fence was in that defective condition when the horse was killed. He, therefore, held that the defendants were not liable under section 254 of the Railway Act, which imposes on the Company the duty of maintaining fences and cattle-guards. There is evidence that there are no cattle-guards along the railway in that part of the country. If the fence along the railway was in good repair, then the horse was just as liable to get out of the field at any of the other two sides which abut on the highway, when he would be "at large," and the onus of proving negligence under section 294 would be on the defendants. In going from section 6 to section 7, where the horse was killed, the horse would have to cross the highway between sections 6 and 7, so that, no matter where he escaped from the pasture field, whether direct to the line of railway, or first to the highway and then on to the railway, the horse would, before entering section 7, be "at large" within the meaning of clause 294 of the Railway Act.

The learned County Court Judge holds that the plaintiff's pleadings are so framed that he could not recover under section 294 and that, no amendment having been asked for at the trial, he should nonsuit the plaintiff. With all due respect, I think the Judge should give a more liberal reading to section 95 of the County Courts Act, which says: "No formal statement of the cause of action shall be necessary," and it shall be a "simple

statement in writing of the cause of action such that it may be known or understood by a person of ordinary intelligence what the action is brought for."

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The statement of claim indicates that on a certain day, near a certain place, the plaintiff's horse was killed by the defendants' engine, and that he claims \$150 damages. This is a fairly comprehensive statement of the facts, showing what the action is brought for.

In any event, if the evidence did show a cause of action, then, if there was no surprise, the Judge should amend if he thought an amendment necessary.

There is evidence as to the value of the horse.

With all due respect and deference to the learned trial Judge, I would allow the appeal with costs and set aside the nonsuit, with the provision for a new trial upon the terms set out in the reasons of my brother Cameron.

HOWELL, C.J.M., and PERDUE, J.A., concurred.

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## COURT OF APPEAL.

### SPENARD V. RUTLEDGE.

Before HOWELL, C.J.M., PERDUE, CAMERON and HAGGART, JJ.A.

*Principal and agent—Commission on sale of land—Purchaser interested through agent's advertisement—Sale made through another agent—Absence of knowledge on part of vendor—Evidence.*

The defendant agreed verbally with the plaintiff, a real estate agent, that, if the plaintiff would bring him a purchaser for the land in question, (being a part of lot 93 in the Parish of St. Charles, 61½ acres), for \$500 per acre, \$5000 cash, and the balance on terms to be arranged, he would pay the usual commission.

Plaintiff then said he would put an advertisement in the papers and look up clients who might be willing to buy. Plaintiff inserted an advertisement in a newspaper, giving his own name and address, and offering for sale 60 acres in St. Charles, stating the terms, but not the exact location of the land or the name of the owner.

According to the view of the evidence taken by the Judges in Appeal, this advertisement was seen by Gunn (who afterwards purchased the property from defendant), Gunn telephoned to plaintiff and learned from him the number of the parish lot and the name and

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address of the defendant, and then employed one Harper, another real estate agent, to negotiate a purchase directly from defendant, expressly stipulating with Harper that he should share with him the commission to be paid by defendant. Harper then went to defendant, who made the sale to Gunn and gave his receipt for \$500 deposit, but without any knowledge that the plaintiff had had anything to do with the introduction of Gunn as a purchaser. Before anything further was done to complete the sale, and before Gunn had bound himself by any writing to complete it, plaintiff saw defendant, notified him that Gunn was his client and demanded his commission. Defendant refused to pay and afterwards completed the sale to Gunn, paying the full commission to Harper, who shared it with Gunn, according to their agreement.

*Held*, that, under the circumstances, the plaintiff had "brought a purchaser" within the meaning of the contract, as his advertisement was the direct cause of the purchaser being introduced to the vendor and that he was entitled to the commission agreed on.

*Burchell v. Gourie, Limited*, [1910] A.C. 614, and *Stratton v. Vachon*, (1911) 44 S.C.R. 395, followed.

Knowledge on the part of the vendor that the person with whom he completes the sale was introduced by the agent is not the test of his liability to pay the commission: *Stratton v. Vachon, supra*.

At the trial, the plaintiff called Gunn as his witness to prove part of his case. On cross-examination Gunn made statements contradicting material parts of plaintiff's evidence.

*Held*, that plaintiff was not thereby concluded from establishing his case by other evidence, as Gunn was a hostile witness who had, for his own benefit, sought to deprive the plaintiff of his commission and was anxious to justify himself.

*Stanley Piano Co. v. Thomson*, (1900) 32 O.R. 341, followed.

DECIDED: 17th March, 1913.

**Statement.** THE plaintiff, a real estate agent, sought to recover \$793.75 as commission on the sale of the defendant's land to one Robert R. Gunn, under an agreement which he alleged to have been to the effect that the commission would be earned "in the event of the plaintiff finding and introducing a purchaser, or otherwise making a sale of the property."

The statement of defence was a denial of all the plaintiff's allegations.

The case was tried before Prendergast, J., who dismissed the action.

Plaintiff appealed.



A. B. Hudson for plaintiff, appellant, cited *Locators v. Clough*, 17 M.R. 659; *Wilkinson v. Alston*, 48 L.J.Q.B. 733; *Rice v. Galbraith*, 26 O.L.R. 43; *Stratton v. Vachon*, 44 S.C.R. 395; *Murray v. Curry*, 7 C. & P. 584; *Green v. Bartlett*, 14 C.B.N.S. 681; *Lewis v. McDonald*, 120 N.W. 207; *McCormack v. Henderson*, 75 S.W. 171; *Burchell v. Gowrie*, [1910] A.C. 614; *Waddington v. Humberstone*, 15 O.W.R. 824; *Mansell v. Clements*, L.R. 9 C.P. 139; *Douglas v. Cross*, 12 M.R. 534; *Robertson v. Carstens*, 18 M.R. 233, and *Stanley v. Thomson*, 32 O.R. 341.

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W. R. Mulock, K.C., and J. W. E. Armstrong for defendants, respondents, cited *Travis v. Coates*, 27 O.L.R. 63; *Haffner v. Grundy*, 4 D.L.R. 529; *Robins v. Hees*, 19 O.W.R. 277; *Scott v. Moachon*, 2 W.W.R. 774; *Dicker v. Willoughby*, 4 Sask. 251; *Quist v. Goodfellow*, 110 N.W. 65; *Hughes v. Houghton*, 18 M.R. 686; *Locators v. Clough*, 17 M.R. 659; *Stratton v. Vachon*, 44 S.C.R. 404; *Gillow v. Aberdare*, 9 T.L.R. 12; *Barnett v. Brown*, 6 T.L.R. 463; *Lewis v. McDonald*, 120 N.W. 207, and *Waddington v. Humberstone* (*supra*).

PERDUE, J.A. This is an action by a real estate agent against the defendants, who are husband and wife, to recover commission claimed to have been earned on a sale of land. The defendants were the owners of 61½ acres of land being part of lot 93 in the Parish of St. Charles. One evening about 6th April, 1911, the plaintiff and the defendant R. A. Rutledge, while both were returning home, got into conversation on a street car. The plaintiff enquired of defendant whether his land was for sale and the defendant said he would sell at \$500 an acre, \$5,000 to be paid in cash and terms to be arranged for the balance. The defendant was willing to pay the usual commission for effecting a sale. The defendant's statement as to this is: "Out of this price I was ready to pay the commission and I did not care who brought me the buyer. The man

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who would bring me the buyer would get the commission and no other man." The plaintiff then said he would put an advertisement in the papers and look up clients who might be willing to buy.

About 10th April the two met again on the car and the plaintiff showed Rutledge an advertisement he had inserted in the Free Press newspaper offering 60 acres of land in St. Charles for sale. The cash payment of \$5,000 was mentioned, but Rutledge claims that the price was incorrectly stated at \$300 per acre. If the price was so stated it was a clerical error, although the copy of the advertisement which appeared in the Free Press of 11th April, put in at the trial, appears to show the price correctly as \$500 per acre. Whether it was stated as \$300 or \$500 per acre in the earlier issue, does not appear to me to affect the question before the Court. Neither the exact location of the land nor the name of the owner was mentioned. Spenard's name and address were mentioned at the foot of the advertisement.

The plaintiff says that on 13th April, in response to a telephone message from Gunn, who shortly afterwards became the purchaser, he gave Gunn a description of the land and Rutledge's name and telephone number, so that he could communicate with Rutledge and arrange the payments for the balance. He further states that on the same day, Thursday, 13th April, he saw Gunn at his office and Gunn said: "Will you come into my office tomorrow morning? I think I will make a deal with you." Spenard says he did not call the next morning, Good Friday morning, as it was too stormy, but that he again saw Gunn on Saturday morning, 15th April, when the latter said to him, "I don't want to see you now." Spenard asked him if he had changed his mind and Gunn said, "No, but we don't require you, I have nothing to say now to you." Gunn denies the telephone conversation and the interviews with Spenard on the 13th and

15th April, but in his examination in chief Gunn admitted that he saw Spenard in his, Gunn's, office on the 15th.

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For reasons which I shall presently point out, I believe the plaintiff's evidence on that point.

On Friday, the 14th, one Harper, a real estate agent and a friend of Gunn's, went to St. Charles, as he states, and made enquiries concerning the land and the owner of it. He then saw Rutledge on the same day and arranged a sale of the land to Gunn at \$500 an acre, subject to Mrs. Rutledge's approval. On the following day the sale was arranged and a deposit of \$500 was paid by Gunn to Rutledge through Harper. On Monday or Tuesday following, Spenard saw Rutledge and was informed by him that he had sold to Gunn. Spenard then told him Gunn was his client and demanded his commission. This the defendant refused to pay. On Tuesday, 18th April, Spenard's solicitors wrote to Rutledge demanding payment of the commission. The sale was duly carried through and, on 15th May, Rutledge paid Harper \$1,500 commission which was divided between Gunn and Harper.

Harper in his evidence states that on Thursday evening, 13th April, Gunn called him up on the telephone and asked him if he had heard or knew of anything in 93, meaning 93 St. Charles, at \$300 per acre. This was what set Harper in motion concerning the land. Now the question at once arises, how did Gunn know the number of the lot unless he had got it from Spenard at the conversation that same day, which Spenard says took place and which Gunn denies? Further, Harper says, "I think he (Gunn) said, 'a man by the name of Spenard is advertising this property at \$300 an acre.'" From the foregoing it appears clear to me that Gunn had the conversation with Spenard which Spenard says took place and that he got the description of the land from him.

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Harper says he had arranged with Gunn that if the deal went through Gunn would get a share of the commission. The sequence of the events and the rapidity with which they followed one another are important. The arrangement as to the commission, by which Gunn was to profit, and did profit, as he admits, to the extent of a half, is a very important element. I have no hesitation in believing Spenard's account of what took place and am convinced that Gunn, after getting the information from Spenard, enlisted Harper's assistance and arranged the scheme by which Spenard should be deprived of his commission and by which it should be diverted into the pockets of Gunn himself and his associate, Harper.

With great respect, I think the learned trial Judge quite overlooked the importance of the portions of Harper's evidence to which I have above referred. I understand that judgment was not given in this case until some eight months had elapsed since the trial. The trial Judge had not the advantage, when making up his judgment, of reading the extended report of the evidence, and he would necessarily have to rely on his notes taken at a period some months prior to making up his reasons for judgment.

The plaintiff had to call Gunn as a witness to prove a part of his case. In cross-examination Gunn denied that he had had any conversation with the plaintiff on the 13th. The learned trial Judge, speaking of the possibility that Gunn may have got his information as to the land from the plaintiff, says: "But, whatever may be the implication from this fact alone, it cannot avail the plaintiff against the testimony of Gunn whom, unfortunately for him, the circumstances of his case required that he should call as a witness on his behalf." Evidently the learned trial Judge took the view that the plaintiff was concluded by Gunn's statements, because he had called him as his witness, even though these statements were

brought out in cross-examination and were not elicited by the plaintiff himself. I must, with respect, entirely disagree with this conclusion. Gunn was a hostile witness who had, for his own benefit, deprived the plaintiff of the commission and who was anxious to justify himself in what he had done. In *Stanley Piano Co. v. Thomson*, 32 O.R. 341, where the point is fully discussed and the authorities collected, it was held that, where a witness, whether a party to the action or not, is called to prove a case and his evidence disproves it, the party calling him may yet establish his case by other witnesses, called not to discredit him, but to contradict him on facts material to the issue.

For the reasons I have above given, I think the plaintiff's version of the facts is the correct one. With the facts as he gives them established, his acts brought the buyer and seller together and were the effective cause of the sale. This principle was settled in *Green v. Bartlett*, 14 C.B.N.S. 681, and *Mansell v. Clements*, L.R. 9 C.P. 139, and recently affirmed in *Burchell v. Gowrie and Blockhouse Collieries*, [1910] A.C. 614, and *Stratton v. Vachon*, 44 S.C.R. 395.

Nothing turns upon the words "bring me a buyer" which the defendant so strongly insists that he used. To bring a purchaser, or to produce, or introduce, or find a purchaser, have no real difference in meaning so far as the liability of the seller to pay a commission is concerned, if the agent actually brings buyer and seller together.

The plaintiff acted with the utmost promptness in claiming the commission from the defendant before the latter had paid it to Harper. Although, as Sir Louis Davies has pointed out in *Stratton v. Vachon*, knowledge on the part of the vendor that the person with whom he completes the sale was introduced by the agent is not the test of his liability to pay commission, the defendant had

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full knowledge within a day or two after the deposit was made and long before the sale was formally completed.

I think the appeal should be allowed with costs, the judgment in the Court of King's Bench reversed and judgment entered for the plaintiff for \$793.75 with costs of suit.

CAMERON, J.A. Gunn, the purchaser, first received his information that the property in question was for sale through an advertisement (not giving the name of the owner or specifying the number of the lot) in the Free Press newspaper, which was inserted by the plaintiff over his signature. As a result of this Gunn called up the plaintiff at his office on the telephone and, the plaintiff not being in, left a message giving his own number. This was on April 12. Gunn says he had no conversation, telephonic or otherwise, with the plaintiff until April 15.

According to Harper, Gunn, on April 13, called him up on the telephone and asked him if he "had heard or knew anything in 93 at \$300 per acre." Harper went out the following day and saw Mr. Ness, the secretary of the municipality, and ascertained from him the name of the owner of Lot 93. In the course of that day Harper saw Rutledge and finally tendered a cheque for the deposit, which Rutledge would not accept without consulting his wife. The next morning Rutledge accepted the cheque and gave Harper a receipt.

Harper says that Gunn told him "A man by the name of Spenard is advertising this property at \$300 an acre." Harper did not consult the plaintiff, who was advertising the property, but went to Mr. Ness and, ultimately, directly to the owner. That he made no attempt to put himself in touch with Spenard leaves him open to the suspicion that his plan of operations was adopted for the express purpose of avoiding too great a subdivision of the commission on the transaction, and that the original sug-

gestion with reference to this course came from Gunn, who, in the result, received apparently only half of it.

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CAMERON,  
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I must say that Gunn's evidence is not wholly satisfactory. He is uncertain on several material points, and if he did not get the number of the lot from Spenard he should have disclosed the source of his information. The fact that Gunn had the knowledge is a corroboration of Spenard's story, and he certainly did not linger long before he took action in accordance with what he states actually occurred.

There is no question that the advertisement inserted by the plaintiff was the cause of Gunn's ultimate introduction to the vendor. The mistake of \$300 for \$500 in the advertisement as it originally appeared is entirely immaterial. It is true that Rutledge may not have known of the plaintiff's connection with the sale to Gunn. But such knowledge is no test of the agent's right to a commission, and the agent here certainly lost no time in asserting his rights. It appears to me that the instructive judgments in *Stratton v. Vachon*, 44 S.C.R. 395, dispose of this case.

Had some person outside this transaction altogether noticed the advertisement and mentioned it casually to Gunn, who had thereupon instituted inquiries through Harper, who had finally discovered the number and owner of the lot, then the case might be different, and come within the principle of the decision in *Imrie v. Wilson*, 3 D.L.R. 826, 21 O.W.R. 964. It might well be held that in such a case Spenard was a cause of the introduction of the purchaser, in truth a *causa sine qua non*, but not the effective cause or *causa causans*, and, therefore, not entitled to recover. Such a transaction might easily be viewed as a new and independent transaction.

I would allow the appeal and give the agent his commission.

HAGGART, J.A. I accept the finding of facts of the

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Judgment. trial Judge as proved in the evidence, but with all due respect, I do not agree with some of his conclusions.

HAGGART,  
J.A. Counsel for the respondent says the agreement was to "bring" a purchaser, the meaning of which, he contended, was to put the proposed buyer in personal contact with the vendors. Lord Bramwell says: "The expression 'If you can find a purchaser' may be explained as meaning, if you can introduce a purchaser to myself or can introduce a purchaser to the premises, or call the premises to the notice of the purchaser": *Wilkinson v. Alston*, 48 L.J.Q.B. 733, 744. I believe the parties really meant the getting, finding or procuring or bringing some one who should subsequently become the buyer. This is not a serious objection.

The defendant further takes the ground that, the plaintiff having called Robert R. Gunn, the purchaser, as a witness, is bound by his evidence, and that such evidence disproves the plaintiff's case.

There is no doubt that Gunn is an adverse witness. He contradicts the plaintiff in certain material facts. The question as to how far a party is bound by such a witness was considered in *Stanley Piano Co. v. Thomson*, 32 O.R. 341. It is a judgment of the Divisional Court, and the principle established is: "Though one called as a witness (party or not) may disprove the case of the plaintiff calling him, yet that case may be established by other witnesses called not to discredit the first, but to contradict him on facts material to the issue." The above is the substance of Chancellor Boyd's decision, and Ferguson, J., at p. 349, says:

"It seems to me that the plaintiff had the right, without any ruling or leave of the trial Judge, to go on and give his evidence, though such evidence, being as it was relevant to the issue, should contradict the evidence already given by him and even though it would incidentally have the effect of discrediting his former witness. What the plaintiff wanted to do was simply to give some more relevant



evidence. I am of the opinion that the law entitled him to do this, and I have not found any decision that forbids him so doing."

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See *Robinson v. Reynolds*, 23 U.C.Q.B. 560; *Ewer v. Ambrose*, 3 B. & C. 751; *Greenough v. Eccles*, 5 C.B.N.S. 802; *Odger's Law of Evidence*, 705 (d).

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J.A.

If we believe the plaintiff it is clear how the defendant and Gunn came together and, in considering the contradictory evidence, I think, in order to displace the effect of the plaintiff's evidence, it was for the defendant to show how Gunn was introduced to the defendant, whose identity was known in the earlier stages of the transaction only to the plaintiff, or how Gunn was introduced to the land whose description was known only to the plaintiff. Where did Gunn or Harper get the number of Lot 93 or the name and whereabouts of the defendant? Under the circumstances, I think the defence should have given some evidence on this point. This feature, I think, is some corroboration of the plaintiff's story.

I would draw the inference from the whole evidence that Gunn, having obtained the clue from the plaintiff's advertisement, or from the plaintiff himself, employed Harper to look up the owner and the land and to commence negotiations. It was his interest to do so. Harper was his friend, and had been interested with him in former deals. He, Gunn, was benefited in the reduction of the purchase price to the extent of at least half of the commission. The whole commission amounted to \$1,500.

I would further infer that, having got the information and having been put in communication with the defendant and introduced to the property, Gunn desired to shove the plaintiff aside, to get rid of him.

Shortly after the payment of the \$500 deposit, and the giving of the receipt, notice is given to the defendant of the plaintiff's claim, certainly before the transaction is closed by paying the balance of the initial payment, the

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Judgment. giving of the deed of conveyance and the mortgage for the balance of the purchase money.

HAGGART,  
J.A. Gunn's subsequent conduct, I think, supports the above inference. Gunn is not bound by the receipt for the deposit or the memorandum satisfying the Statute of Frauds. The defendant is bound. Gunn refused to close unless a commission of \$1,500 is paid to Harper. He insists upon changing the contract by adding this term. The defendant then has to choose between conceding this or allowing the deal to go off.

The defendant closes the deal and pays Harper the commission demanded, and takes his chances with the plaintiff.

All this time the defendant had notice of Spenard's claim. He at least had notice of existing circumstances sufficient to put him on inquiry.

If I am right in my inferences above mentioned, I think that this sale would not have been brought about but for the action of the plaintiff, and it has been held sufficient in most cases that the agent has been instrumental in bringing the purchaser and vendor together, although negotiations were subsequently exclusively by the parties: *Stratton v. Vachon*, 44 S.C.R. at p. 406, Duff, J.

"The legal rule is thus stated by Lord Atkinson, delivering the judgment of the Privy Council in *Burchell v. Gowrie and Blockhouse Collieries*, [1910] A.C. at p. 624. 'There was no dispute about the law applicable to the first question. It was admitted that, in the words of Erle, C.J., in *Green v. Bartlett*, 14 C.B.N.S. 681; 'If the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him.' Or, in the words of the later authorities, the plaintiff must show that some act of his was the *causa causans* of the sale: *Tribe v. Taylor*, 1 C.P.D. 505, or was the efficient cause of the sale."

And Anglin, J., in *Stratton v. Vachon*, at p. 410, says:

"In my opinion the defendant has established that his introduction was the foundation upon which the negotiations which resulted in the purchase proceeded and without which they would not have proceeded: *Wilkinson v. Martin*, 8 C. & P. 5. The relation of buyer and seller was really brought about by him: *Green v. Bartlett*, 14 C.B.N.S. 685, that is, by his introduction, *Barnett v. Isaacson*, 4 Times L.R. 645."

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J.A.

I note how frankly the defendant R. A. Rutledge gives his story of the transaction. He does not keep back anything, even if it tells against him.

Amongst the exhibits is what purports to be an affidavit sworn to by Harper on the 21st of April, six days after the date of the deposit receipt, and the day before the registration of the transfer and mortgage, in which Harper assumes to swear that he negotiated the sale to Gunn, had no negotiations whatever with the plaintiff, had no acquaintance with the plaintiff and never had any negotiations whatsoever with him either directly or indirectly, in connection with the sale. Now what was the purpose of this document? Does it not appear that the defendant, having notice of the plaintiff's demand, was fearing trouble from this quarter and that this document was given to allay his apprehension? It is to be observed that it is really not an affidavit, nor a statutory declaration, and the responsibility of the party making it amounts only to that of a person making a statement over his signature. Inquiry from Harper alone, interested as he was in the transaction, was not sufficient.

I agree with the observations of the trial Judge as to there being no explanation as to how Harper located the land, and his suggestion of the possibility of Harper getting the information from Gunn and of Gunn getting it from the plaintiff, and the further finding that the plaintiff somewhere, somehow or by some one or other, was taken advantage of; but differ, with all due respect, from him when he says this cannot avail the plaintiff

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against the testimony of Gunn, the plaintiff's witness, and that nothing has been brought to the defendant's door. Before the deal was closed the defendant had notice of enough to put him on enquiry. He chose to close the transaction; in fact he made a new deal so as to direct \$1,500 of the purchase money into the channel demanded by the purchaser.

I would allow the appeal with costs.

HOWELL, C.J.M., concurred.

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### COURT OF APPEAL.

#### SCHWARTZ V. WINNIPEG ELECTRIC RY. CO.

Before HOWELL, C.J.M., PERDUE and HAGGART, JJ.A.

*Negligence—Street railway—Evidence—Plaintiff's witnesses contradicting each other—Non-suit—Respective functions of Judge and jury at trial.*

Action for damages for injuries received in falling from the steps of a street car. The negligence relied on was in suddenly starting the car while the plaintiff was preparing to alight at a street corner where it had stopped in response to her signal, whereby she was thrown to the ground and seriously injured.

The plaintiff's evidence was that she had signalled the car to stop at Gunnell Street, that she went to the vestibule to be ready to get off, that the car stopped while she had a foot on the first step and her hand on the rail and that she remembered no more. The rules of the Company required the motorman to cross completely over the street before stopping.

The only other evidence was that of one Winkler, who said he was on Gunnell Street, a block away from the place of the accident, that he saw the car in question going fast across Gunnell Street, heard the woman make a noise, went to the place and found the plaintiff lying about the middle of Gunnell Street, at the intersection of Logan Avenue along which the car was going, and that he did not see the car stop, although in another part of his evidence, in answer to the question, "It didn't stop?" he said "No, perhaps a second it stopped and then went on."

The defendants did not call the conductor or motorman of the car.

*Held*, (PERDUE, J. A., dissenting), that there was sufficient evidence to warrant the jury in finding as they did, that the motorman or

conductor had caused the car to stop at Gunnell Street, and to start again at the moment when the plaintiff was proceeding to alight, that such starting of the car was negligent and that the plaintiff had fallen off or been thrown from the car thereby; and, that, therefore, the verdict of the jury in plaintiff's favor should stand.

*Metropolitan Ry. Co. v. Jackson*, (1877) 3 A. C. 193, and *Bridges v. North London Ry. Co.*, (1874) L.R. 7 H.L. 213, followed.

*Held*, also, that, although a witness called by the plaintiff contradicts his evidence as to a material point, the plaintiff is not thereby concluded, but the case must be left to the jury as to which story they will believe.

*Stanley Piano Co. v. Thomson*, (1900) 32 O.R. 341, followed.

*Sumner v. Brown*, (1909) 25 T.L.R. 745, not followed.

*Per* PERDUE, J. A., dissenting. The plaintiff's evidence left it altogether doubtful as to what caused her to fall. She could not say, and did not attempt to say, what caused it. She might have slipped and fallen while alighting. She might have been seized with a sudden vertigo which caused her to fall, or she might have been struck by a passing vehicle.

When two inferences may be drawn, one of which implies negligence and the other one does not, and there is no presumption in favor of one rather than the other, then the plaintiff fails to prove his case: *Wakelin v. London & S.W.R.*, (1886) 12 A.C. 41; *Pomfret v. Lancashire & Yorkshire Ry.*, [1903] 2 K.B. 718, and *McKenzie v. Chilliwack*, [1912] A.C. 888.

Taking into consideration the rule of the Company that cars should only stop after completely crossing the street, the fact that the plaintiff was found in the middle of the street and Winkler's evidence that the car went rapidly across the street, the most reasonable inference to draw is that the plaintiff fell from the step while the car was in motion and before it reached the proper stopping place. If so, the plaintiff was injured as a result of her own negligence and should not recover.

DECIDED: 17th March, 1913.

THE plaintiff alleged in her statement of claim that she was a passenger on one of the defendants' cars on Logan Avenue in the City of Winnipeg and had rung the bell as a signal to the motorman to stop the car at Gunnell Street, a street at right angles to Logan Avenue; that in expectation of the car stopping she arose from her seat and walked to the vestibule; that the car when it reached Gunnell Street did stop and the plaintiff prepared to alight; that while she was in the act of doing so "the said car did with a violent jerk move on, in

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Statement. consequence of which the plaintiff was thrown from the said car on to the roadway with such force that she became unconscious \* \* ." She claimed that she was severely injured by the fall and alleged that it was caused by the negligence of the motorman or the conductor of the car, or both of them, in causing the car to start without observing whether the plaintiff had alighted, and also in causing the car to start in such a negligent manner as to make it jerk violently and at a speed that was not reasonable or proper in starting a car.

The action was tried before Prendergast, J., with a jury. At the close of the plaintiff's case defendants' counsel moved for a non-suit. The trial Judge, with a good deal of hesitation, as he stated, refused to enter a non-suit. The defendants put in no evidence.

Eight questions were put to the jury and, upon the answers given to these, the Judge entered a verdict of \$1,500 for the plaintiff.

The following were the questions asked and the answers given:

1. Did the car stop at or near the intersection of Logan Avenue and Gunnell Street? A. Yes.

2. Did the plaintiff on the occasion in question, whatever may have been the cause, meet with an accident in falling off or being thrown from the car? A. Yes.

3. If the plaintiff met with such accident, was she injured thereby? A. Yes.

4. Did the motorman or conductor, or both of them, at the moment when the plaintiff was proceeding to alight, cause the car to start? A. Yes.

5. If so, was the car started with a jerk and at an unreasonable rate of speed for a car to start? A. Cannot say.

6. If the car was started when the plaintiff was about to alight, do you believe it was such starting of the car that caused the accident? A. Yes.

7. Was such starting of the car negligent? A. Yes.

8. Did the plaintiff notify the conductor by ringing

the bell that she wished to alight at Gunnell Street? 1913

A. Yes.

Statement.

The jury assessed the damages at \$1,500.

Defendants appealed.

*E. Anderson, K.C.*, for defendants, appellants, cited *Sumner v. Brown*, 25 T.L.R. 745; *Metropolitan Ry. v. Jackson*, 3 A.C. 193; *Wakelin v. London & S.W.R.*, 12 A.C. 41; *Pomfret v. Lancashire & Yorkshire Ry.*, [1903] 2 K.B. 718; *Hiddle v. National Fire Ins. Co.*, [1896] A.C. 372; *McKenzie v. Chilliwack*, [1912] A.C. 888; *Halsbury*, vol. 21, p. 441, and *Jones v. C.P.R.*, 14 Can. Ry. Cas. 76.

*E. A. Cohen* and *R. W. McClure* for plaintiff, respondent, cited *Bridges v. North London Ry.*, L.R. 7 H.L. 239; *Jackson v. Metropolitan*, (*supra*); *Robson v. North Eastern Ry.*, 2 Q.B.D. 89, and *Davey v. London & S.W. Ry.*, 12 Q.B.D. 70.

HOWELL, C.J.M. I have had the advantage of reading the judgment of my brother Haggart, and I agree with him as to the disposition of this case.

The car in which the plaintiff was travelling was being rather closely followed by another, and the conductor was apparently chary about stopping, for he passed one street without any attention to the plaintiff's ringing the bell.

She rang again; it was his duty to stop the car; she swears the car stopped for an instant at all events; the jury find it did stop, and I think this finding cannot be disturbed.

She says she was on the top step with her hand holding the rail and lifted one foot to go down, and that is all she remembers until in the hospital. She was found by the conductor of the closely following car lying on the street insensible. Winkler, a short block away, says he heard a shriek and looked up and saw the car, which she had been on, moving.

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Judgment. The jury find that the car started while she was alighting and that this caused the accident.

HOWELL,  
C.J.M. It was the duty of the defendants to so regulate matters that she could reasonably and safely alight and, apparently for further safety, they have a rule requiring the conductor to be in the rear porch when the car stops. I assume that the conductor was there performing his duty when the car stopped. The defendants also have a rule that the conductor must at once report all accidents and I assume this was reported. Neither the conductor nor the motorman was called as a witness, and no evidence is given as to any report. The conductor, an officer in the defendants' employ, could give all the facts in this matter, and, to use the language of Sir Charles Moss in *Euclid Ave. v. Hobs*, 24 O.L.R. at 450, "The fact that he was not called by the defendants militates against them."

The jury is the proper tribunal to draw the inferences of fact and it seems to me there was as much to justify their findings in this case as in *Makins v. Piggott*, 29 S.C.R. 189; *Grand Trunk Ry. v. Griffith*, 45 S.C.R. 380, and *Ajum Goolam v. Haje*, [1901] A.C. 362.

Counsel for the defendants stated that he did not ask for or wish a new trial.

The appeal is dismissed with costs.

PERDUE, J.A. The fourth question submitted to the jury is the all important one, because it contains the very gist of the action which the plaintiff set out to prove. The jury, by their answer to that question, found in effect that while the plaintiff was alighting from the car it was set in motion by the motorman, conductor or both. Let us now examine what evidence there was, if any, to support this finding.

The plaintiff states that on the night of the accident she got on the car which proceeded west along Logan Avenue. She lived on Bushnell Street, which runs at



right angles to Logan Avenue, and she says she rang the bell to stop the car at that street, that the car did not stop there, that she then rang the bell for it to stop at Gunnell Street, the next intersecting street. She says the car did stop at Gunnell Street, that she passed into the vestibule and proceeded to alight, that she had her right foot on the first step and had hold of the rail with her right hand, but that after that she remembers nothing. This is all the evidence that was placed before the jury to enable them to answer the fourth question and other following questions which depend upon an affirmative answer to the fourth. The only other witness called as to the happening of the accident was one Winkler, and his evidence, which I shall examine later on, so far from assisting the plaintiff, contradicts her in important respects.

Taking the plaintiff's account of what happened, what negligence is there shown upon the part of the defendants? She signalled to have the car stopped and it was stopped. She was on the step in the act of alighting while the car was at a standstill; but what occurred thereafter was a blank in so far as her recollection is concerned. She cannot say, and does not attempt to say, what caused her fall. We are left to speculate as to the cause of her injury. Did she slip and fall while alighting? Was she seized with a sudden vertigo which caused her to fall from the step? Was she struck by a passing vehicle, or did the car move forward and cause her to lose her footing on the step? It appears to me that any one of these guesses is as plausible as another. If, indeed, the one the jury is asked to make, that the car was started forward before she had reached the ground, conveyed the true answer, it would be reasonable to expect that she would have some recollection of the car moving and of her losing her footing on the step and her hold upon the rail.

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It is incumbent on the plaintiff to prove some negligent act or to establish facts from which negligence may reasonably be inferred. Where two inferences may be drawn, one of which implies negligence and one which does not, and there is no presumption in favor of one view rather than the other, then the plaintiff fails to prove his case: *Wakelin v. London & S.W.R.*, 12 A.C. 41; *Pomfret v. Lancashire & Y.R.*, [1903] 2 K.B. 718. In the *Wakelin* case Lord Halsbury said:

"It is incumbent on the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of her husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition; '*Ei qui affirmat non ei qui negat incumbit probatio.*'"

The same principle is affirmed by the Privy Council in *McKenzie v. Chilliwack*, [1912] A.C. 888. In that case the deceased had been confined in a wooden lock-up provided by the defendants. The lock-up caught fire from some unknown cause and deceased came to his death in the fire. Plaintiffs failed to prove how the fire was caused. It was held that, if an inference was to be drawn, it would not be unreasonable to infer that the place was set on fire by the deceased, or a fellow prisoner of his, or both.

I have considered the present case so far upon the evidence of the plaintiff herself. But, when we come to examine the evidence of Winkler, who was called by the plaintiff and is the only witness who gives any facts bearing on the cause of the accident, the impropriety of drawing the inference she asks to be drawn becomes much

more apparent. At the time of the accident, Winkler, who was returning to his home on Gunnell Street, was at the corner of that street and Henry Avenue, Henry Avenue being the next street to Logan and parallel to it. He says he heard some noise and saw a car running very fast and did not see it stop. He went to the place and found the plaintiff lying on the ground injured. A second car had come up and the conductor of that car assisted in removing the plaintiff from where she was lying. The plaintiff's husband and the conductor of the second car had both arrived on the scene before Winkler. The plaintiff, Winkler says, was lying in the middle of Gunnell Street, and the place where the unfortunate woman had struck the ground was shown by the mark of blood at about the centre, or a little to the east of the centre, of that street. He says he saw the car crossing Gunnell Street and going fast. The following extracts are taken from his evidence on cross-examination:

Q. Could you see it crossing Gunnell Street? A. Yes, I saw the car crossing.

Q. While it was crossing Gunnell Street about how fast was it going, do you say? A. It was going fast and going straight ahead.

Q. Full tilt? A. Yes. \* \* \*

Q. You were up on Henry Street and you could see it coming up in the light and you never saw it stopping at all? A. No, I saw it going. \* \* \*

Q. You were looking at it going across and you did not see it stop? A. No.

Q. And you heard the woman make a noise? A. Yes.

Q. And that was at the time you saw the car crossing? A. Yes.

In another part of his evidence the plaintiff's counsel put the question to him, "It didn't stop?" To this he answered, "No, perhaps a second it stopped and then went on." But throughout his evidence the impression upon his mind is shown, that the car ran rapidly across Gunnell Street and did not stop there.

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The evidence of Winkler, the plaintiff's witness, and the only witness besides herself who gave any facts relating to the accident, contradicts her statement that the car stopped at Gunnell Street. When one of the company's cars is signalled to stop at an intersecting street, the mode of operation is for the car to cross that street and stop at the farther crossing. This is a well-known rule in Winnipeg and was, I understand, referred to by plaintiff's counsel at the trial. In any event, the company's book of rules, which was put in by the plaintiff, shows that this is the rule to be observed when stopping cars in response to a signal (Rule 201). The same rule says: "Do not stop cars so as to block cross-streets or cross-walks." It is reasonable to assume that the company's servants would in stopping the car observe the rule. The plaintiff says the car stopped in the middle of Gunnell Street to permit her to alight. It is clear that she fell from the car in the middle of Gunnell Street, or a little to the east of that point. If the car stopped there, it was contrary to the above rule. But we have the additional fact that Winkler saw the car running fast across Gunnell Street, going "full tilt," so that it is impossible that it stopped where the plaintiff fell. Taking the whole evidence that the plaintiff has presented, the most reasonable inference to draw is, it appears to me, that the plaintiff received her injury by falling from the step while the car was in motion and before it reached the proper stopping place. If such inference is the correct one, she herself caused the accident by her own negligence. She should not have been on the top step or trying to dismount while the car was in motion. If such inference is true, the injury was not caused in the manner in which she claims it was caused, and which she undertook to prove, namely, by a sudden starting of the car from a standstill while she was in the act of alighting.

The car on which the plaintiff was riding was well filled with people, yet not one of these was called to prove that the car stopped at Gunnell Street, or to prove any other fact in connection with the case. The plaintiff's husband was one of the first persons, if not the very first, to appear on the scene after the accident, yet he was not called as a witness.

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The plaintiff relied on *Bridges v. North London Ry. Co.*, L.R. 7 H.L. 213. Without going into the facts of that well known case, it is sufficient to point out that there was in that case an inference which could be fairly drawn from the facts proved. There were not two or more conflicting inferences to be drawn, each of them equally consistent with the facts. In *Metropolitan Ry. Co. v. Jackson*, 3 A.C. 193, where the *Bridges* case was commented on, the view of Lord Justice Bramwell in the Court of Appeal (2 C.P.D. 134) was cited with approval:

"Supposing the evidence to be consistent with negligence, namely, that negligence may have caused the matters complained of, it is equally consistent with no negligence, namely, that the matters proved may have been caused otherwise than by negligence, and it is an elementary rule that, when evidence is consistent as much with one state of facts as with another, it proves neither." (3 A.C., page 206.)

The relative functions of judge and jury, where the subject matter of the action is negligence, are declared in *Metropolitan Ry. Co. v. Jackson*, by several of the judges. Lord Cairns said: "The judge has to say whether any facts have been established by evidence from which negligence may reasonably be inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred." Lord Blackburn and Lord Gordon quoted with approval the statement of Willes, J., in *Ryder v. Wombwell*, L.R. 4 Ex. 38, that "there is in every case a preliminary question which is

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one of law, namely, whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a non-suit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant."

The rule laid down by Willes, J., which I have just cited, was accepted by the Privy Council in *Hiddle v. National Fire & Marine Co.*, [1896] A.C. 372, which was an action by insured against insurers on a policy of insurance. Lord Davy, in giving the judgment of the Court, after accepting the above rule, considered a non-suit in the case proper, "although there may have been some evidence to go to the jury, if the proof was such that the jury could not reasonably give a verdict for the plaintiffs."

In the present case there is no evidence to show what caused the plaintiff to fall, and no evidence to prove the negligence charged, namely, the sudden starting of the car while she was alighting. Even the plaintiff's evidence, insufficient as it was to lay the foundation for the inference she asked the jury to draw, is rendered worthless by the contradiction of her own witness, Winkler.

The plaintiff was, no doubt, severely injured and the jurors and everyone else naturally feel sympathy for her. But the defendants cannot be called upon to compensate her in damages unless it can reasonably be found that they, by their negligence, caused the accident.

In my view a non-suit should be entered.

HAGGART, J.A. On the 27th of March, 1911, about ten o'clock in the evening, the plaintiff boarded a street car going west at the corner of Main Street and Logan Avenue, intending to ride to Bushnell Street, which runs at right angles to Logan, and upon which the plaintiff then resided. Her story is that as the car was approach-

ing Bushnell Street she rang the bell which was the signal to the motorman to stop. The car did not stop, whereupon she rang the bell again to stop at the next street west, called Gunnell Street. As the car slowed up she went to the vestibule and, when it stopped, proceeded to alight, and just as she had her right foot upon the first step she either fell or was thrown from the car, and she remembers nothing more until some days afterwards when she recovered consciousness at the hospital. She states that the car had come to a stop before she proceeded to alight; her words are "When the car stopped I put my foot on the first step and after that I don't remember anything." According to the doctors the injuries sustained were serious.

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The plaintiff then called a witness, Winkler, who lives on Gunnell Street, who had been at the store on Henry Street for groceries. When at the corner of Henry Ave. and Gunnell St., a block distant and north of Logan Avenue, on his way home, he says, "I heard some noise and I saw a car running very fast and I didn't see it stop and a woman cried or made a noise," and he continues in answer to the question, "Did you see the car stop?" he says: "I could not see the car stop because the car was going fast. I would be on the corner of Henry and Gunnell Street and I heard a noise from the woman and left my groceries and went to her." When he got to her a second car had come from the east. The woman was removed, and the second car proceeded on its way. He then rendered what assistance he could to the plaintiff's husband, who was at the scene of the accident. Winkler, when asked further, "What happened to the car?" he answers, "The first car went on."

Q. It didn't stop? A. No, perhaps a second it stopped and then went on.

Q. That is the car on which the plaintiff was?

A. Yes, I was too far away to see much of that.

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The defendant's counsel urges that, from the fact that the plaintiff was lying in the middle of Gunnell Street and that Winkler swore when he saw the car it was going fast, the legitimate inference to be drawn is that the plaintiff walked off or fell from the platform when the car was in motion, and that the plaintiff is contradicted by her own witness when she testified that the car stopped in the middle of Gunnell Street, when she proceeded to step down from the platform, and the defendants claim that the trial Judge should have withdrawn the case from the jury and entered a non-suit.

Defendants rely upon a principle laid down in *Odger*, p. 570, "that, where two equally credible witnesses called by one side contradict each other, it is not competent for the party calling them to seek to discredit one and accredit the other."

The authority given by the text writer for the above proposition is *Sumner v. Brown*, 25 L.T. 745. This was a ruling of Hamilton, J., at the Liverpool Assizes. In this case the plaintiff's claim was admitted and the defendant counterclaimed for breach of a contract to sell potatoes. The defendant relied upon a railway company's delivery note which was a receipt for bags. The defendant put one of the plaintiffs in the witness box to prove the signature to the delivery note, when the plaintiff stated definitely to his counsel that no contract had been made. The Judge disposes of the case in these terms:

"Upon the question of the plaintiff Levesley's evidence, Mr. Keogh had called him with his eyes open and with full knowledge of what he was likely to say, and it was not competent for the defendants to contradict him on the vital point of contract or no contract. It was not as if unexpected evidence had been given or there had been some contradiction in details. When two equally credible witnesses called by the same party flatly contradict each other, it was not competent for the persons calling



them to pick and choose between them. They could not discredit one and accredit the other."

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In the present case there is not a flat contradiction. It is never expected that all the witnesses on the same side should agree in every particular and a certain amount of discrepancy in details will not destroy the value of the testimony. Indeed if there is a concurrence in minute details there might arise a suspicion that the story was manufactured.

There were two witnesses to this incident, the victim, who is quite clear up to the point she fell or was thrown from the car, and Winkler who, a block distant at ten o'clock at night, says he heard a woman's cry and saw a car passing along. The distance is considerable and his field of vision would be narrow looking along the street. From such different view points, I would expect that they might have different impressions as to what actually happened.

The question as to how far a party is bound by his own witness was very fully considered in *Stanley Piano Co. v. Thomson*, 32 O.R. 341.

The action was to restrain the defendants from manufacturing pianos from a scale or patterns belonging to the plaintiffs, and for a return of the scale and patterns. On the opening of the case plaintiffs' counsel read from the depositions of one of the defendants taken on a motion for an interim injunction certain questions and answers in which he swore that he had drawn a scale from a piano manufactured by the plaintiffs and had made his patterns from that scale. It was admitted he had the right to do that, as the scale and patterns were neither patented nor copyrighted, and that if that was the way they were obtained the plaintiffs could not succeed, but plaintiffs' counsel proposed to show that the defendants were manufacturing pianos similar to the plaintiffs which could only be done from the plaintiffs' own scale and

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patterns, a set of which had disappeared from their workshop where this defendant had previously worked, and, in order to do that, tendered evidence that it was impossible to make the scale in the manner in which this defendant testified in his depositions he had done. Such evidence was objected to as being in contradiction of plaintiffs' own witness, and the trial Judge refused to receive the evidence.

On the appeal to the Divisional Court, Chancellor Boyd and Ferguson, J., gave carefully considered judgments.

Chancellor Boyd, at p. 343, says:

"Though one called as a witness (party or not) may disprove the case of the plaintiff calling him, yet this case may be established by other witnesses called not to discredit the first, but to contradict him on facts material to the issue. This proposition was regarded as settled law of long standing prior to the statute on the subject passed in England in 1854, C.L.P. Act, sec. 22. It was one of the many rules of evidence which have grown up as the result of practice so as to become the law of the land. Unless explicitly altered by legislation, these rules are to be regarded as not affected or curtailed by permissive statutory enactments."

Ferguson, J., p. 349:

"It seems to me that the plaintiff had the right, without any ruling or leave of the trial Judge, to go on and give his evidence, though such evidence, being as it was relevant to the issue, should contradict the evidence already given by him and even though it would incidentally have the effect of discrediting his former witness. What the plaintiff wanted to do was simply to give more relevant evidence. I am of the opinion that the law entitled him to do this, and I have not found any decision that I think forbids him so doing."

See *Ewer v. Ambrose*, (1825) 3 B. & C. 751; *Friedlander v. London Ass. Co.*, 4 B. & Ad. 195; *McNab v. Stinson*, 6 O.S. 445; *Robinson v. Reynolds*, 23 U.C.R.

560; *Greenough v. Eccles*, 5 C.B. N.S. 802; *Odger's Law of Evidence*, 705 (c), 705 (d).

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I do not think the plaintiff and Winkler contradict each other. Even if they did differ in their versions, under the salutary rule set forth the jury had the whole evidence before them and it was all relevant.

The defendants say there was no evidence of negligence, that the case should have been withdrawn from the jury.

In *Metropolitan Ry. v. Jackson*, 3 A.C. 193, the Lord Chancellor, p. 197, says:

"The Judge has a certain duty to discharge and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence *may* be reasonably inferred; the jurors have to say whether from those facts when submitted to them negligence *ought* to be inferred."

P. 198: "The negligence must in some way connect itself with the accident."

P. 200: "It is indeed impossible to lay down any rule except that which at the outset I referred to, namely, that from any given state of facts the Judge must say whether negligence *can legitimately* be inferred and the jury whether it *ought* to be inferred."

Lord Blackburn, at p. 207, says:

"And, if the facts as to which evidence is given are such that from them a further inference of fact may legitimately be drawn, it is for the jury to say whether that inference is to be drawn or not; but it is for the Judge to determine, subject to review, as a matter of law, whether that further inference may legitimately be drawn."

The plaintiff was a passenger on the railway and, having paid her fare, it was the duty of the defendants to carry her safely and land her safely at her destination. The failure to stop when signalled at the proper street shows that there was carelessness or inattention on the part of some one. The story of the plaintiff up to the moment she became unconscious is consistent and uncon-

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tradicted. She says the car stopped and Winkler does not swear that it did not stop. In a moment she is on the road unconscious. I would not assume that she courted injury. There is a blank; no one saw her fall; no one can tell how long the car stopped. Who can supply or fill that blank unless it be the defendant's servants? The defendants have a perfect right to say, we will not make the case for the plaintiff, but the keeping back of evidence alone in their possession may be the subject of comment by Judges, and jurors may draw their inferences therefrom.

As to Judges making observations, see the remarks of Moss, C.J., in *Euclid Ave. v. Hobs*, 24 O.L.R. 450.

In *Bridges v. North London Ry.*, L.R. 7 H.L. 213, no one saw the deceased fall from the car. He was found by a passenger on a heap of rubbish in the tunnel. The jury had to draw their inferences. In this case I think the Judge was right in his ruling that there were facts established by evidence from which negligence *might* be reasonably inferred and, the jury on those facts having found that negligence *ought* to be inferred, we cannot disturb that verdict.

The observations in the judgment delivered by Lord Atkinson in *Toronto Railway Co. v. King*, [1908] A.C. 260, where the tram car ran against a van and killed the driver, are applicable:

"Their Lordships are therefore of opinion that the defendants were not entitled to a non-suit, that there was evidence to go to the jury on the two issues: (1) whether the driver of the tram car was guilty of negligence; and (2) whether the deceased was guilty of contributory negligence. The jury have practically found these issues in favor of the plaintiffs. They are the tribunal entrusted by the law with the determination of issues of fact and their conclusions on such matters ought not to be disturbed because they are not such as

Judges sitting in Courts of Appeal might themselves have arrived at."

The appeal should be dismissed with costs.

*Appeal dismissed.*

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REX V. WILLIS AND POPE.

Before GALT, J.

*Criminal Law — Trial — Postponement — Publication in newspaper of alleged confession of accused person — Contempt of Court.*

The publication, in newspapers circulating largely in the City where the assizes are being held, of news matter with display headings stating that a person accused of murder, for which he is to be tried at that assize, has confessed his guilt to a police officer; is good cause for postponing the trial to the next assizes, as it is calculated to prejudice the minds of the jurymen there assembled against the prisoner, and to prevent him from having a fair trial. Moreover, evidence of the alleged confession might not be allowed to be given at the trial.

Such a publication anticipates the course of justice and might be treated as a contempt of Court, because its tendency is to deprive the Court of the power of administering justice duly, impartially and with reference solely to the facts judicially brought before it.

*The King v. Davies*, [1906] 1 K.B., 32, followed.

DECIDED: 20th March, 1913.

APPLICATION on behalf of two prisoners for a post-ponement of the trial until the next assizes.

*C. H. Locke* for Eva Willis.

*J. F. Davidson* for Pople.

*H. P. Blackwood* for the Crown referred to *Quirk v. Dudley*, 1 O.W.R. 637.

GALT, J. The application on behalf of Eva Willis is supported by an affidavit of Charles Holland Locke, which shows that the accused persons were arrested on the 11th day of March, 1913; that on the 13th day of March the Manitoba Morning Free Press, a paper having a very large circulation throughout the

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City of Winnipeg and the Province of Manitoba, published on the front page of the morning edition of said paper, in large type, the words following:

"Jury returns verdict of murder. Chief Marcil states Mrs. Willis confessed to murder of child."

And following the said heading there was printed a long article purporting to be descriptive of the alleged confession of Mrs. Willis, commencing as follows:

"We've killed the child. We've done wrong, but it is done and cannot be undone. Mrs. Yeoman spoke to us about taking the child away, saying that it was keeping the other boarders in the house awake. We tried to place it in a home, but we could not find a place for it anywhere; we then decided to kill it."

And the article then proceeded to give in part what purported to be a confession made by the accused Willis to the said Chief of Police.

Several other extracts from the Free Press are also detailed in the affidavit, quoting what was supposed to have been admitted by the prisoner.

The affidavit then shows that on the same day the Winnipeg Telegram, a daily paper published in the City of Winnipeg, and having a very large circulation throughout the said City, published a sensational story in regard to the crime alleged herein. On the front page there was printed, in large type:

"Chief of Police gives startling evidence of mother's confession. Strangled baby, then left her in boat."

On page 12 of the same issue of the Winnipeg Telegram there was a large photograph of both the accused, with the following heading:

"Young man and woman who confessed to having murdered baby."

The affidavit further states that on the same day an account of the alleged confession was also published in the Winnipeg Tribune, an afternoon paper published in the

City of Winnipeg, with a very large circulation, and states that, by reading the articles above referred to and other articles which have been published in the said daily papers since the arrest of the accused herein, the jurors who will be called upon to try the said case will, before any evidence is tendered by the Crown and before said trial is commenced, be led to believe that both of the accused persons above named have confessed to the murder of the child.

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The affidavit proceeds to allege certain reasons for a contention on behalf of the accused Eva Willis that the alleged confession by her would be inadmissible in evidence against her at the trial, and Mr. Locke further states that he believes that, in order that the accused Eva Willis may have a fair trial on proper evidence herein before a jury uninfluenced by the publication of statements, such as the above, it is necessary that the trial herein should be postponed until the next assizes to be holden for the Eastern Judicial District, when a jury may be summoned who will be able to deal with the case uninfluenced by any consideration, other than the evidence which is produced before them in proper form.

And the affidavit concludes with the statement that the application is made in good faith and with no other end in view than that the said Eva Willis may have a fair and impartial trial.

An affidavit was also read, made by Joseph F. Davidson, solicitor for the accused Victor Cyril Pople, stating that the time is too short for said accused to be ready for trial on the date fixed for it, namely, March 26th, and that he believes a fair trial of the defendant could not be had at the present assizes on account of the publicity which has been given to this matter by the daily newspapers of this City, and that he believes that public opinion at the present time is very much against the

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said accused, and that in consequence thereof his interests are very greatly prejudiced.

Mr. Davidson further relates an incident of overhearing a certain conversation between two of the jurymen who might be called on this trial, but whom he does not know. One of them stated to the other that "If that fellow comes up for trial, and I am on the jury, he will not get any consideration from me," or words to that effect.

Mr. Blackwood, appearing for the Crown in this matter, opposes the motion upon the ground that no sufficient cause is shown for a postponement; that all the matters published by the papers, with the exception of the headings, were matters which were given in evidence at the inquest, to which the public would be admitted; and he reads an affidavit made by himself, showing the difficulty of keeping witnesses here, and offering on behalf of the Crown to empanel another jury, if needful; but he presses the necessity of proceeding with the trial without unreasonable delay.

It appears to me that the newspapers in question entirely over-stepped the limits of justice and fair dealing towards the prisoners in publishing broadcast the items in question, and especially the head-lines, which must have been prepared by the newspapers themselves. One of the first requisites of our administration of criminal law is that every one accused of crime shall have, as far as possible, a fair and impartial trial.

The law with regard to confessions is perhaps not very clearly understood by newspapermen; but the admissibility of a confession is hedged about with many difficulties, for it has been found in practice that confessions have been extracted from prisoners which were subsequently found to have been erroneous in many particulars, and, in some cases, absolutely without foundation in fact. I only mention this for the purpose of showing that every



confession is attended with a certain amount of difficulty. This is so well understood by lawyers that counsel for the Crown, even when relying upon a confession which he feels sure of having admitted in evidence, is not allowed, in opening his case to the jury, to disclose what the confession is until after it has been decided to be admissible in evidence by the Judge.

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The material before me shows that the newspapers of Winnipeg have anticipated the course of justice, and deprived the prisoners' counsel of any benefit which the prisoners might have by the confession or confessions being ruled out as inadmissible. It is impossible, in my opinion, to say that the two prisoners are not most seriously prejudiced by the publication of the articles in question.

I have not had much opportunity of looking into this matter since granting leave to the accused yesterday to bring on the motion; but I would like to refer to the case of *The King v. Davies*, [1906] 1 K.B. 32, as showing the principles which should govern the Court as regards the effect of such publication. There the application was on behalf of a prisoner to attach an editor for contempt of Court. The following language used by Wills, J., in delivering the considered judgment of the Court, at p. 34, indicates the principles on which the Court acted. He says:

"This is an application to commit the defendant for contempt of Court. The circumstances which have given rise to it are as follows: A woman was arrested on September 2, 1905, on a charge of abandoning a child at Morriston, in the county of Glamorgan. She was brought before the magistrates at Swansea on September 5. The defendant is the editor, printer, and publisher of the *South Wales Daily Post*, a newspaper published at Swansea. In the issue of the paper published on the evening of September 5 there appeared a report of the proceedings before the justices, followed by a statement headed 'Antecedents of the Accused,' and in the issue of

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September 8 another article entitled 'Traffic in Babies,' and in the issues of September 9 and 12 further articles relating to the accused person. They contained a great number of statements calculated to give an exceedingly unfavorable impression of the prisoner, and notably the article of September 8 stated that she had been guilty of wholesale child farming, and alleged her identity with one Dora Johnstone who, it was alleged, had more than once been convicted of fraud; but it is not necessary to give any more specific account of their contents, as Mr. Bankes, who appeared for the defendant, admitted that nothing could be said in defence or even in palliation of the act of publishing such articles concerning a person under a remand upon a charge which might lead to her committal. He confined his argument to denying the jurisdiction of this Court to deal with the present application; on the ground that as the crime charged could be tried at quarter sessions the publication was an offence against the quarter sessions, and could not be dealt with summarily by this Court.

"It would perhaps be enough to say that, inasmuch as the question whether the committal should take place to the assizes or quarter sessions depended in all probability upon the mere accident of which tribunal might hold its sittings before the other, it was just as much a contempt of the assize court as of quarter sessions, and, if so, our judgment in *Rex v. Parke*, [1903] 2 K.B. 432, applies. We adhere to the view we expressed in that case that the publication of such articles is a contempt of the Court which ultimately tries the case after committal, although at the time when they are published it cannot be known whether there will be a committal or not. Their tendency is to poison the stream of justice in that Court, though at the time of their publication the stream had not reached it; and, as such articles are calculated to interfere with the power of the Court (whatever it be) that tries the case to do effective justice, it is a contempt of any Court which very well may try the case, but in fact does not do so, as well as of the Court which actually tries it."

Then, again, at p. 40, he says:

"What then is the principle which is the root of and underlies the cases in which persons have been punished

for attacks upon Courts and interferences with the due execution of their orders? It will be found to be; not the purpose of protecting either the Court as a whole or the individual judges of the Court from a repetition of them, but of protecting the public, and especially those who, either voluntarily or by compulsion, are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired."

In the present instance, looking at the material before me, I cannot resist the conclusion that every man upon the jury must have had his mind affected by the publication of these articles in the Winnipeg papers during the present assizes. To what extent our newspapers may circulate throughout the country I do not know; but it appears to me that, so far as any trial at the present assizes goes, the authority of the Court has been undermined to a large extent, and the minds of the jurors cannot but be seriously affected against the prisoners by the publication of their alleged confessions, which may or may not, at the trial of the case, be admitted in evidence at all.

Mr. Blackwood has suggested that the Crown would be quite willing to empanel another jury in order to proceed with the trial as promptly as possible; but I do not think that, under the facts as disclosed by the affidavits, that would meet the justice of the case. I think it is absolutely necessary, in order to secure a fair trial of these two prisoners, that the case should stand over until the next assizes.

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## COURT OF APPEAL.

## SWANSON v. McARTHUR.

Before HOWELL, C.J.M., PERDUE, CAMERON and HAGGART, J.J.A.

*Parties to action—Foreign corporation as defendant—Service of statement of claim out of jurisdiction—Practice—Ex parte order—Referee, jurisdiction of—Rescinding order—Time for moving to rescind—Irregularity—Costs—King's Bench Act, Rules 201 (g), 342, 438.*

When the statement of claim in an action against two defendants, one of whom is resident within the jurisdiction and the other is not, sets up more than one claim against the resident defendant, but only one as against both defendants, the non-resident defendant is a proper party to the action in respect of that claim and, under Rule 201 (g) of the King's Bench Act, the service of the statement of claim on him out of the jurisdiction should be allowed to stand, but the condition should be imposed that proceedings at the trial and otherwise, so far as that defendant is concerned, should be restricted to that part of the plaintiff's claim which alone affected that defendant.

*Mussey v. Heynes*, (1888) 21 Q.B.D. 330, followed.

The Court refused to impose the further condition that, if the plaintiff should fail to establish his claim against the resident defendant in respect of that part of the claim, then his action should be dismissed as against the non-resident defendant, as it might have done on the authority of *Jones v. Bissonette*, (1902) 3 O.L.R. 54, and left that question to be dealt with by the Judge presiding at the trial.

The non-resident defendants had obtained from the Referee an order setting aside the service on them on notice to the plaintiff only. Afterwards on motion of the resident defendant, the Referee rescinded his former order.

*Held*, per MATHERS, C.J. K.B.,

- (1) That the Referee's first order, as far as the resident defendant was concerned, was an *ex parte* order and the Referee had jurisdiction to rescind it.
- (2) That, although the motion to rescind was not made within four days as required by Rule 438, the Referee could, under Rule 342, decline to give effect to the objection.

Costs of the appeal and of the appeal to the Chief Justice from the Referee's order referred to be disposed of by the trial Judge.

DECIDED: 14th April, 1913.

Statement. APPEAL from the judgment of Mathers, C.J.K.B., dismissing an appeal from an order made by the Referee on the 10th of June, 1910, which order rescinded a former

order made by the Referee dated the 1st March, 1910, setting aside the service of the statement of claim on the defendants, the Eastern Construction Company, and striking their name out of the statement of claim on the ground that they were not proper parties to the action and were not subject to the jurisdiction of the Court. 1913  
Statement.

On the hearing of the appeal from the Referee the following judgment was delivered by

MATHERS, C.J.K.B. In December, 1909, plaintiff began an action against the defendant McArthur and the Eastern Construction Co. McArthur resides in the Province of Manitoba, but the Construction Company is an Ontario corporation, with head offices at the City of Ottawa in that Province.

McArthur had a contract for the construction of a large portion of the National Transcontinental Railway, and he sublet a portion of the work to the plaintiff. Subsequently he assigned, it is alleged, his contract for the work so sublet to his co-defendant.

The action is brought to recover from McArthur for work done under such subcontract, but the statement of claim also contains this clause: "The plaintiff undertook and performed the said work, including variations ordered by the said Engineer, and in addition thereto, at the request of the defendants, work on said line from Station 1186 to Station 1200, at the rates and prices provided for in said agreement, and the whole of said work was completed on December 7, 1908."

The plaintiff claims for the whole work against McArthur, but claims for the work done between stations 1186 and 1200 as against the Construction Company, if it should be considered that such work was done at the request of the Company, and for that Company alone. In the prayer a claim is made against McArthur and, in the alternative, against the Construction Company.

McArthur, on the 11th February, 1910, filed a state-

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ment of defence in which, amongst other things, he claims relief over against his co-defendant, the Construction Company.

The Construction Company, having been served, moved to set aside the service and to strike their names out of the statement of claim on the ground that they were not proper parties to the action and were not subject to the jurisdiction of the Court, and on the 1st of March, 1910, an order was made by the Referee in the terms asked for.

Notice of this application had been served on the plaintiff, but not upon McArthur. Subsequently, when the order was served upon McArthur, he moved to rescind it, and on the 10th June, 1910, an order was made by the Referee rescinding his former order. From this latter order the Construction Company appeal.

On the statement of claim as framed the Construction Company was, in my opinion, a proper party to the action, and, therefore, there was jurisdiction to serve them with a statement of claim out of Manitoba under sub-section (g) of Rule 201.

The Construction Company, however, contend that the Referee had no jurisdiction to rescind his own order. If the order is not to be regarded as an *ex parte* order I think that contention would be correct: *Re Doyle v. Henderson*, 12 P.R. 38.

An *ex parte* order may be set aside upon an application made within four days from the time of its coming to the notice of the party affected, under Rule 438. As to the defendant McArthur this order was, in my opinion, an *ex parte* order, and the Referee had jurisdiction to rescind it under this last mentioned Rule.

It is said, however, that the application was not made within the four days prescribed, and that no order was made extending the time. Under Rule 342: "It shall not be necessary to give effect to any objection on the ground of irregularity if it shall appear that the interests

of the party objecting are not and will not be affected by such irregularity." This objection was apparently taken before the learned Referee, and he did not give effect to it—no doubt upon the ground that the interest of the applicant was not affected. I think the Referee was right in so dealing with the objection.

The appeal will, therefore, be dismissed with costs in the cause to the defendant McArthur in any event.

The Eastern Construction Company appealed.

*D. H. Laird* for appellants, the Eastern Construction Company, cited *Emperor of Russia v. Proskouriakoff*, 18 M.R. 56, 68; *Anchor Elevator Company v. Heney*, 18 M.R. 96; *Maw v. Massey-Harris*, 14 M.R. 252; *Simpson v. Hall*, 14 P.R. 310; *Jones v. Bissonette*, 3 O.L.R. 54; *Witted v. Galbraith*, [1893] 1 Q.B. 434; *Collins v. North British v. Mercantile Ins. Co.*, [1894] 3 Ch. 228; *Speller v. Bristol*, 13 Q.B.D. 96; *McCheane v. Gyles*, [1902] 1 Ch. 287; *Duder v. Amsterdamsch*, [1902] 2 Ch. 132, and *Sirdar v. Rajah of Faridkote*, [1894] A.C. 897.

*W. C. Hamilton* for McArthur, a respondent, cited *McCheane v. Gyles*, [1902] 1 Ch. 311; *Merry v. Pownall*, [1898] 1 Ch. 312; *Massey v. Heynes*, 21 Q.B.D. 330; *Pilley v. Robinson*, 20 Q.B.D. 155; *Swansea v. Duncan*, 1 Q.B.D. 644, and *Dubout v. Macpherson*, 23 Q.B.D. 340.

*W. H. Trueman* for plaintiff, respondent, cited *Yorkshire v. Eglinton*, 54 L.J.Ch. 81; *Honduras v. Tucker*, 2 Ex. D. 301; *Bennetts v. McIlwraith*, [1896] 2 Q.B. 464, and *Langley v. Law Society*, 3 O.L.R. 245.

The judgment of the Court was delivered by

CAMERON, J.A. This action is brought by the plaintiff against the defendant McArthur, a resident of this Province, and the Eastern Construction Company, a corporation having its head office at the City of Ottawa in the

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Province of Ontario. No other ground is asserted for making the Company a party defendant than that it comes within sub-section (g) of Rule 201, more particularly referred to hereafter.

As against the individual defendant, the plaintiff, according to his statement of claim, seeks to recover moneys alleged to be due under an agreement that the plaintiff should execute certain work in the construction of the National Transcontinental Railway, to be paid for by the defendant McArthur at the rates and prices set out therein, with such variations of said work as the Chief Engineer might direct.

It is further alleged that the plaintiff performed the work agreed to be done under said agreement, including variations ordered thereunder, and (here we have the corporation defendant first referred to in the allegations) "in addition thereto at the request of defendants work from station 1186 to station 1200, at the rates and prices provided for in said agreement, and the whole of said work was completed on December 7, 1908." This is plainly an assertion or declaration that, independently of the work done under said agreement and of the variations thereof under the supervision of the Chief Engineer, there was separate and distinct work done on the line of construction from station 1186 to station 1200 by the plaintiff at the request (the joint request, I take it) of the two defendants, the individual and the corporation, and that it was agreed that this separate and distinct work should be paid for by the two defendants on the basis of the prices and rates fixed by the agreement, previously mentioned, to which the plaintiff and the defendant McArthur were parties. Without question there is here, as against the corporation defendant, alleged a cause of action, and, taking the statement in this paragraph as it stands by itself, it certainly alleges a direct and not an alternative cause of action.



Particulars of the plaintiff's claim are set forth in paragraph 6 of the statement of claim, the same being prefaced by these words: "The following are particulars of the work done by the plaintiff under said agreement, including said variations and said additional work." One item of these is:

"Work	Estimate	Rate	Amount"
"Trainfill	264,010	.46 4/5	\$123,556.68."

There is nothing stated in the pleadings to show that this item of trainfill comes within the work claimed to be done under the agreement or is part of the variations ordered by the Engineer under that agreement, or is work in addition to and independent of the agreement.

This statement in paragraph 6 is ambiguous. "Work done \* \* \* under said agreement, including said variations and said additional work." Does the word "including" govern the words "said additional work" so that these latter words mean "additional work" under said agreement, and is, therefore, "additional work" merely a repetition of "variations"? Or is the word "and" disjunctive, the intention being that "additional work" should refer not to the variations but to the work from station 1186 to 1200? It would seem to me that we must adopt the former construction.

Finally in paragraph 10 it is asked that, if the Eastern Construction Company alone is found to be liable for the work from station 1186 to station 1200, relief be given against the Company.

So far as the claim is for relief as against McArthur under the agreement in respect of work done thereunder or variations authorized thereby, the plaintiff has nothing whatever to do with the Eastern Construction Company and is, therefore, not entitled to make it a party to this action.

This is not a proceeding under rule 246 of the King's

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Bench Act, under which the defendant McArthur seeks to serve, or has served, a notice on a person not a party to the action. To make a third party, who is outside the jurisdiction, a party defendant, it is necessary that there should be at least two contributors, one of whom is subject to the jurisdiction. The principle to be applied is the same as if the subject matter of the claim of the defendant were the subject of an independent action: *McCheane v. Gyles*, [1902] 1 Ch. 287, per Vaughan Williams, L.J., at p. 298.

There is power given by sub-section (a) of rule 242 to add any party, as plaintiff or defendant, at any stage, where it may be deemed necessary. But there is no provision that gives this power to add in case of parties out of the jurisdiction.

Rule 201 provides that service out of the jurisdiction of a statement of claim may be made whenever:

(g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

The whole question here is whether the Construction Company comes within this sub-section, and, if it does, to what extent.

Is the Construction Company here a proper party? I would say it is in so far as the plaintiff alleges a claim against it in respect of the work done from station 1186 to 1200, but not otherwise. If the Construction Company were within the jurisdiction there could, in view of the provisions of rule 219, be no doubt whatever. And this is the test to be applied. "Supposing both defendants had been within the jurisdiction, would they both have been proper parties to the action?" per Lord Esher, M.R., in *Massey v. Heynes*, 21 Q.B.D. at p. 330. The Court cannot take into account what may be the result of the trial. See also *Witted v. Galbraith*, [1893] 1 Q.B. 431.

In the result it seems to me the proper order to be

made in this case is to allow the service of the statement of claim on the corporation defendant to stand, on condition, however, that proceedings at the trial and otherwise, so far as it (the defendant corporation) is concerned, shall be restricted to the work alleged to have been done by the plaintiff from station 1186 to station 1200, in respect of which relief is claimed against both defendants. It was urged that there should also be a further condition that, in the event of the plaintiff failing to establish his claim against McArthur in respect of the foregoing, his action as against the Eastern Construction Company shall be dismissed, on the ground that, if the plaintiff fails as against McArthur in respect of the work from station 1186 to 1200, then his only justification for joining the Construction Company will be shewn to have had no existence. This was the reasoning adopted by the Divisional Court in *Re Jones v. Bissonette*, 3 O.L.R. 54, as set out in the judgment of Mr. Justice Street at p. 57, and it does appear to me that that argument is one to which it is, to say the least, difficult to find an answer. But it remains open to the defendant Company effectually to raise the defence of want of jurisdiction and, that being so, the Judge presiding at the trial can be left to deal with this branch of the case, should the necessity arise, on the principles indicated.

The second paragraph of the order of the Referee of June 10, 1912, must be set aside. The first paragraph will stand subject to the modifications which have been set forth above.

As to the question of costs. On this motion each of the parties has succeeded to a certain, though not, of course, to the same, extent. Moreover, it is difficult, at this stage, to provide for the various possible results of the action. The reasonable course to adopt seems to me to be to refer the costs of the appeal from the order of the Referee to the Chief Justice, and of the appeal from the order of the

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1913 Chief Justice to this Court, to the Judge at the trial to be  
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CAMERON, and I would so direct.  
J.A.

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## COURT OF APPEAL.

### Re PHILLIPPS AND WHITLA.

Before HOWELL, C.J.M., PERDUE, CAMERON and HAGGART, J.J.A.

*Solicitor and client—Costs—Taxation—Law Society Act, R.S.M. 1902, c. 95, s. 65—Commission or percentage—Fees for services in litigious business.*

A solicitor cannot, in the absence of a special agreement such as is provided for by section 65 of the Law Society Act, R.S.M. 1902, c. 95, recover against his client, for work in connection with an action in the Court, any fees or charges other or greater than those set forth in the tariff of costs promulgated under the King's Bench Act, and the taxing officer, in fixing "an allowance for proceedings taken by the solicitor to save costs or compromise actions," although given a wide discretion as to the amount, should be guided by the analogy of the tariff and allow only a fee which would be in some measure commensurate with what is usually taxed in respect of items of similar or greater importance, such as counsel fees, having regard to the time expended, the skill exercised in the negotiations, the success achieved, and, in this case, to the very liberal sums allowed in respect of other items of the bill which were not contested on the appeal.

Though the amount involved in the action should also be considered, yet the fee allowed should not be in any way fixed on a percentage or commission basis as the sum of \$3500 allowed in this case must have been.

*Re Johnston*, (1901) 3 O.L.R. 1, and *In re Attorneys*, (1876) 26 U.C.C.P. 495, distinguished on the ground that they had no reference to the remuneration of a solicitor for services in litigious business.

Appeal allowed with costs and matter referred back to the taxing master for re-consideration with a direction to fix a fee or allowance on settlement upon the above principles.

DECIDED: 14th April, 1913.

Statement.

THIS appeal arose out of a bill of costs rendered by the solicitors to their client, such costs having been incurred in and incidental to an action brought against the parties defendant to set aside a sale of certain land in Winnipeg.

This action proceeded as far as the pleadings and an order for production, and was then compromised, the defendants conceding the plaintiff's claim and re-conveying the property, each side bearing their own costs. 1913  
Statement

In the first instance a bill was rendered containing items of disbursements which were not disputed, and an additional item "Fee on settlement, \$9,500." On taxation this was reduced to \$7,976.44, being at the rate of 5 per cent on the difference between the amount of the sale and the value of the property as estimated by the client. This taxation was reviewed on appeal by Mr. Justice Robson (22 M.R. 154), who held that the method applied by the taxing officer was unauthorized, but gave liberty to the solicitors to deliver an amended itemized bill.

Thereupon the bill now in question was delivered. Objection was taken on taxation mainly to two of the items: that of \$255 for searching the titles to properties adjacent to that in question in which certain of the defendants had been interested; and the other of "Fee on settlement as per negotiations, October 18th to November 24th, \$8480." This item is preceded by a series of statements as to interviews, consultations, etc., with reference to the settlement ultimately carried out, extending from October 18th to November 24th. In respect of these charges are not made, it being indicated that they should be considered as contained in the charge of \$8480.

The item of \$255 was reduced by the taxing officer to \$153, and that of \$8,480 was reduced to \$3,500.

From this taxation the client appealed to Mr. Justice Metcalfe who refused to interfere and dismissed the appeal with costs. It was from that order of Mr. Justice Metcalfe that the present appeal was taken.

*G. W. Jameson* for the client cited *Wilkinson v. Smart*,

1913 33 L.T. 573; *Blake v. Hummell*, 51 L.T. 430; *Quay v.*  
Argument. *Quay*, 11 P.R. 258, and *Re Robinson*, 17 P.R. 137.

*A. B. Hudson* for the solicitors cited *Pobjoy v. Rich*, 27 L.J.Ex. 10; *Paradis v. Bossé*, 21 S.C.R. 419; *Armour v. Kilmer*, 28 O.R. 618; *Burton v. Burton*, 29 L.J.Ex. 291; *Howard v. Burrows*, 7 M.R. 181, and *Re Solicitors*, 27 O.L.R. 147.

HOWELL, C.J.M. The bill of costs in this matter as taxed is for a suit which proceeded as far as statement of claim, statement of defence and order for production.

The bill may be divided into three parts: 1st, up to negotiations for settlement, taxed at \$435.07, a very few dollars of which is for disbursements. This includes large counsel fees for advising before action is begun. A counsel fee of \$20 on statement of claim is included, and for receiving or writing seven letters \$100 is taxed. The 2nd part is for negotiating settlement, which was taxed at \$3,500. The 3rd part is for charges carrying out the settlement by various conveyancing charges, negotiating a loan, letters and attendances, taxed at \$409.43. The total disbursements in the whole bill of costs are \$34.

From my knowledge of the tariff and of professional charges, I would think that the taxing master, as to the 1st and 3rd divisions of the bill has been excessively liberal—for instance, he allowed the sum of \$315 for negotiating a loan after settlement had been agreed upon; but, as this and other items, which seem to me unusually large, were not opposed in the appeal, they need not be further considered, except that they should be taken into account in considering the real point in dispute.

The 2nd division of the bill is the item of \$3,500 taxed and allowed as a fee or allowance on settlement of the suit. The solicitors were fully armed for this settlement by having already charged liberally for investigating the law and the facts and they have set forth in the bill minutely what they did by way of work in

arriving at this settlement and they should be paid for this according to the tariff. I am a great believer in settling suits, and I think this should be encouraged, for justice is more often thereby done, and the fees allowed therefor should be liberal and I think something in the nature of counsel fees in large matters should be allowed. If the matters at stake are large the solicitors would probably take greater care and have more anxiety and should be allowed accordingly. The solicitors, however, are mere employees to be paid for their work, and there is no magic about it. They must be paid according to the tariff. When they have taken proceedings to save costs or compromise actions the master is to make an "allowance" for this work; but it must be on the principles of the tariff. If the cause had been taken down to trial, with preliminary examinations, subpoenas, briefs, consultations and a long, anxious and weary trial, the solicitors at the end of it, even if they had acted as counsel and were entitled to all the fees, could not, it seems to me, have taxed as large a bill as the one now under discussion.

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I think the master should re-consider this one item in the bill of costs which, to my mind, is altogether excessive and should fix it on the principles of the tariff, and should, in doing this, consider also the amount already allowed for the other services set forth in the bill of costs.

The judgment of Mr. Justice Metcalfe is reversed with costs, this appeal is allowed with costs and the matter is referred back to the taxing master to re-consider the fee of \$3,500 taxed and allowed by him and to fix the fee or allowance for settlement.

PERDUE, J.A. The main question that arose in this matter was settled by the judgment of Robson, J., (22 M.R. 154), a judgment with which I fully concur. The bill as rendered in the first place consisted of one item:

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"Fee on settlement, \$9,500." An order had been obtained on *præcipe* for the taxation of the bill. Both the client and the solicitors attended on the taxation and neither party took any objection to the validity of the order or to the jurisdiction of the taxing master. The taxing officer allowed the solicitors, as remuneration for their services, five per cent on the estimated value of the property recovered. From this an appeal was taken to Robson, J., who held that the above method of arriving at the amount to be allowed to the solicitors was not authorized. The bill was referred back and the solicitors were given liberty to deliver an amended itemized bill.

Accordingly, an itemized bill was delivered. This bill has been taxed and only one item was disputed on the appeal to this Court. That item was the fee allowed upon the settlement of the suit of McGibbon, the client, against Messrs. Oldfield, Kirby & Gardner. In making the charge there was a lengthy *précis* of the conferences, negotiations, attendances, etc., by the solicitors extending over a period of more than a month while the settlement was being discussed and brought to a conclusion. It was regarded as one item by the parties and was taxed as a fee on settlement which would include all the work of the solicitors during the month or so they were engaged in effecting the settlement. I see no reason why a separate charge should be made for each conference or attendance while they were so engaged. The taxing officer could take into account, as no doubt he did, all the work done, the time spent and the skill exercised in effecting the settlement; and, while arriving at the amount of the fee, he could look at the summary of the work accompanying the charge in order to estimate the volume of the work done and the time spent upon it.

The fee on settlement was charged at \$8,480, and the taxing officer allowed \$3,500. Upon appeal Metcalfe, J., said, in giving judgment: "I cannot find that the sum



allowed is either exorbitant or so excessive as to justify my interference." He, therefore, dismissed the appeal with costs.

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The item in the tariff relating to fee on settlement, referred to by Robson, J., in his judgment, gives the taxing officer the very widest discretion as to the amount to be allowed, subject of course to appeal. In arriving at the quantum to be taxed on such item, the taxing officer may well take into account the amount involved, the time expended, the skill exercised in the negotiations and the success achieved. In the present case the client obtained everything he sought to recover by the suit. The solicitors are to be credited with having conducted the litigation and the negotiations for settlement with great professional skill and business capacity, and with having been completely successful in their efforts. The taxing officer should, therefore, allow them a fee which would, in his judgment and discretion, be commensurate with the services rendered. But, taking into account everything that should be considered, has he exercised a proper discretion in allowing so large a sum as \$3,500 in respect of this one item? This charge, I find, covers conferences, consultations, correspondence and advice extending over a period from 18th October to 24th November. Something was done in connection with the settlement on twenty days out of that period, but on several of these merely a letter was written or a communication from the client read and considered.

If the action had been proceeded with in the ordinary way down to trial and judgment, without any settlement having been proposed or considered, and the client had been completely successful, is it reasonably probable that the solicitor and client bill in the suit, from instructions to trial and judgment and including counsel fees, would have been taxed at as much as the single item that has been allowed as a fee on settlement? We must bear in

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mind that there was no special contract made, as the statute permits, between the solicitors and the client, and that all question as to remuneration by way of percentage on amount recovered has been eliminated by the judgment of Robson, J., which is binding upon the parties. The taxing officer should allow, under this item, only the amount which the solicitors' services in respect of the settlement were reasonably worth, taking all the circumstances into consideration, but bearing in mind that in the rest of the bill liberal remuneration has been allowed for every other service performed by the solicitors in connection with the suit.

Such cases as *Re Johnston*, 3 O.L.R. 1, and *Re Attorneys*, 26 U.C.C.P. 495, do not affect the question under consideration in this appeal. They referred to services performed in connection with matters not in actual litigation and in respect of which there was no tariff provided. The "fee on settlement" in this bill of costs covers the compromise of a suit in actual litigation and is an item specified in the tariff.

I think the bill should be referred back to the taxing officer in respect of this item only, and that he should reduce it to such an amount as should reasonably be allowed, taking into account all the facts and circumstances, the amount involved, the result achieved, the time spent in the negotiations, etc. At the same time the taxing officer should bear in mind that he is taxing an item in a bill of costs relating to litigation, and that the quantum should be fixed in accordance with the intention of the tariff. The amount to be allowed as a fee on settlement should be in some measure commensurate with what is usually taxed in respect of items of similar or greater importance, such as counsel fees, having regard to the circumstances to which I have above referred.

CAMERON, J.A. I take it that Mr. Justice Robson is unquestionably sound in his view that, unless there be a con-

tract between a solicitor and client for a percentage under section 65 of The Law Society Act, R.S.M. 1902, c.95, the tariff promulgated under The King's Bench Act provides us with the only measure of a solicitor's remuneration for litigious business. The Legislature has expressly provided that a solicitor may make a contract with his client for remuneration "in lieu of or in addition to the costs which by any tariff in force are allowed." Such remuneration may be a portion of the proceeds of the subject matter of the action or "in the way of commission or percentage on the amount recovered \* \* \* or on the value of the property" in question in any action (s. 65, c. 95, R.S.M. 1902), all of which enabling provisions negative the proposition or contention that the solicitor, in the absence of a contract, can recover from the client for charges based on the measure authorized for the first time by the above section.

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Is that not precisely what the solicitors are doing here? It is true that they have detailed at length particulars of interviews and consultations and correspondence. But that does not affect the consideration that the charge here made is, not in form but in substance, the same as that allowed by the taxing officer on the first taxation. I do not mean, of course, that the amounts are the same, but the basis upon which the charge is constructed is substantially the same in one case as the other. That is to say, the solicitors in making the charge, though not formally adopting a percentage basis, are doing so in reality. The amount of the charge clearly bears a relation to the amount apparently saved to the client by the institution of the action; it is because the value of the property recovered is large that the fee charged is of such commanding proportions. This has, it is true, been reduced by the taxing officer; but, even when so reduced, remains a charge based on the value of the property, is therefore fixed on a commission or percentage basis, and consequently not authorized by law.

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CAMERON,  
J.A.

But the tariff of fees now in force does make provision for a charge for compromise of action. "When it is proved that proceedings have been taken by solicitors out of Court to expedite proceedings, save costs, or compromise actions, an allowance to be made therefor, in the discretion of the taxing officer." How is the word "allowance" to be interpreted? Clearly I should say by reference to the other items found in the published tariff. The taxing officer is to make an allowance in such cases in analogy to those allowable under the fixed items of the tariff, and his discretion is to be exercised with respect thereto as in the cases where the amounts are expressly stated. Having this in view, and examining the tariff throughout, I can see nothing that authorizes the taxation of such an allowance as \$3,500. Supposing there had been inserted opposite the tariff item above quoted as taxable the sum of \$50, an amount larger than any other that appears in the tariff, I would say that the charge of \$3,500 allowed is so disproportionate as to be manifestly different in kind from that contemplated by the tariff, and therefore not within the limits of items taxable in litigious business as between solicitor and client. The result follows that, if solicitors wish to take advantage of the provisions of section 65, they must do so directly, by express contract, and that they cannot do so indirectly, by framing their charges on the veiled assumption that the section applies whether there be a contract or not. In the absence of an express contract the solicitors are left to their strict rights.

This conclusion is in accord with the considered judgment of Mr. Justice Robson, which has not, as I see it, been strictly followed by the solicitors or by the taxing officer. It does not seem to me that the bill (on examination of the items thereof in dispute) is made up as he directed and intended. But it would be of no advantage to require the solicitors to furnish a new bill.

No authority in the English or Ontario Courts has been quoted to us to justify the charge objected to, and I do not consider that the authorities of the Courts of the United States are of assistance.

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Judgment.  
CAMEBON,  
J.A.

Mr. Justice Metcalfe in his judgment considered that *Re Johnston*, 3 O.L.R. 1, applies, and that a lump sum by way of *quantum meruit* could properly be allowed. But Mr. Justice Robson points out a material distinction which more fully appears in *Re Richardson*, 3 Ch. Ch. 144. In that case the solicitor became an agent for the sale of lands by virtue of a power of attorney. The present Chancellor of Ontario, then Master in Ordinary, held that commissions charged as part of a bill were taxable. He quotes with approval the following from *Pulling on Attorneys*:

"It comes within the legitimate and peculiar province of attorneys and solicitors at the present day to draw and prepare agreements, wills, deeds, settlements, securities and documents, and also to conduct negotiations, procure and solicit loans, superintend the management of, and the letting, purchasing and selling of property, estates and annuities, to collect and receive rents, debts, etc., invest and dispose of moneys and find sufficient securities for such purposes, etc., etc., thus acting generally in the distinct character of procurators, negotiators, conveyancers, confidential advisers, agents, stewards, receivers, collectors and scriveners."

Clearly the commissions on sales there claimed came within the limitations above specified by *Pulling*. And the Master found there existed a usage in Ontario as in England that an agent, whether solicitor or not, selling lands and collecting proceeds, should be paid by commission upon prices obtained and moneys remitted.

*Re Richardson* was followed by *In re Attorney*, 26 U.C.C.P. 495, where a commission was allowed on moneys paid out by a solicitor in the purchase of lands. In *Re Johnston*, *supra*, a solicitor was allowed a lump

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Judgment. sum of \$3,200 for the collection of \$70,000 from nine insurance companies.

CAMERON,  
J.A.

The distinction between these cases and that now before us is apparent and is pointed out by Mr. Justice Robson, and that is that a percentage basis may be applied in such cases as the sale of property and the receiving and investing or otherwise disbursing moneys, but it by no means follows that the services of solicitors in litigious business can be remunerated according to any such measure. On the contrary, we have a specific rule of our tariff covering exactly the case in point, and, reading the tariff as a whole and considering its various items and directions, it is impossible for me to come to any other conclusion than that the fee on settlement as charged and as taxed is not contemplated by its terms. No attempt has been made to support it by evidence of any binding usage that has grown up in England or in this Province.

The client's expressed willingness to pay generously for services rendered constitutes nothing binding upon him.

I would not criticize the other items of the bill. They have not been closely scrutinized and are not now seriously questioned, although allowed upon a generous scale. But, as to the principal item, it is simply a case where the solicitors might, at one stage, have protected themselves by a contract. Whether they could or could not is, however, immaterial. They have not done so and cannot now evade the statute by claiming to recover on an implied contract what an express contract alone could give them. It is asserted, and not controverted, that the solicitors gave to their client skilful and effective service. But I see nothing in any of the circumstances that entitles them to remuneration on any other scale than that prescribed by the tariff.

I would allow the appeal and would refer the bill back for taxation, under and in accordance with the provisions

of the tariff now in force, by the taxing officer, who should, in fixing the principal item in dispute, not lose sight of the liberal allowance made the solicitors in respect of the undisputed items.

HAGGART, J.A., dissented.

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Judgment.  
CAMERON,  
J.A.

# VAN HUMMELL V. INTERNATIONAL GUARANTEE CO.

Before MACDONALD, J.

*Company—Liability for services of promoter—Managing director—Liability of co-promoters—By-law of company—Ratification—Contract.*

1. A company promoter cannot recover from the company anything for his services rendered or moneys expended in organizing the company unless the Act of incorporation makes provision for payment of such expenses, or unless the company after its incorporation agrees with him to make such payment; nor is a company bound in equity to pay the preliminary expenses because it has adopted and derived benefit from services previous to its incorporation: 5 *Halsbury*, 50.
  - In re *National Motor &c. Co.*, [1908] 2 Ch. 515, followed.
  2. In the absence of an express contract, one of several promoters of a company cannot sue another for remuneration for promoting services or for contribution thereto.
  - Holmes v. Higgins*, (1822) 1 B. & C. 74, followed.
  3. A company cannot be liable to its managing director for wrongful dismissal or breach of contract, if no agreement for his services was ever concluded between them.
  4. A company cannot ratify a contract which was made by its promoters when the company was not in existence: *In re Empress Engineering Co.*, (1880) 16 Ch. D. 125.
  5. A person who acts as manager of a company is entitled to payment from the company for his services during the time that he acted as such, notwithstanding that he was also a director of the company and there was no by-law of the company authorizing his employment.
- Albion v. Martin*, (1875) 1 Ch. D. 580, and *Birney v. Toronto Milk Co.*, (1902) 5 O. L. R. 1, distinguished, the latter on the ground of difference in the statutes applicable.

DECIDED: 5th February, 1913.

THE plaintiff brought this action claiming compensation for services rendered in and about the organization of the defendant Company, and for moneys expended in con-

Statement.

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Statement.

nection therewith, and against the personal defendants for damages for breach of an agreement claimed by him to have been given and made by those defendants that he, the plaintiff, should be employed as general manager of the defendant Company for a period of not less than three years at a salary of not less than twelve thousand dollars per year, and that he should further be given the exclusive right of selling for a reward the whole of the authorized capital of the Company, amounting to the sum of \$2,500,000, at a premium of \$20 per share.

*W. H. Curle* for plaintiff.

*J. B. Coyne* for defendants.

MACDONALD, J. After hearing all the evidence on behalf of the plaintiff, I granted a motion for non-suit as against all the personal defendants, with the exception of the defendant Robinson, and reserved judgment as against him and the Company.

The plaintiff was a company promotor and enlisted the support of the personal defendants in the proposal of establishing in this country a company, known as the International Casualty Company of Spokane, and secured their subscriptions to an amount aggregating \$64,500. The defendant Robinson paid one thousand dollars on account of his stock and the defendant Atchison paid twelve hundred and fifty dollars. The other subscribers gave their notes.

Shortly after this the subscribers, because of a reported arrangement between this Casualty Company and another American company, of which they knew nothing, and of which the plaintiff knew nothing at the time of subscribing for stock, became dissatisfied and sent for the plaintiff and expressed their intention of withdrawing their subscriptions. The defendant Robinson then suggested the organization of the defendant Company. This was followed by the plaintiff severing his connection with the Casualty Company and under-



taking the organization of the defendant Company., The compensation to be allowed the plaintiff was mentioned on several occasions, the first occasion being with the defendant Robinson. The plaintiff suggested being paid by way of commission, to which this defendant objected, and suggested instead payment by way of bonus in the same manner that the Alexanders, a firm of company promoters, were compensated. This was followed by a conversation with the defendants Hudson and Ormond, and the compensation received by the Alexanders was discussed and satisfaction with such compensation expressed by the plaintiff, who thereupon entered upon the work of the formation of the new company. The stock issued to the subscribers to the Casualty Company was delivered up and the notes given in payment returned on the understanding, and, as the plaintiff says, in consequence of, the new company. The plaintiff started a stock subscription canvass, the defendant Robinson being the first subscriber, the plaintiff himself subscribing for a number of shares equal to that of the defendant Robinson.

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MACDONALD,  
J.

The Company was duly incorporated through the guidance and instrumentality of the plaintiff, and its first meeting was held on the 1st April, 1912. At this meeting the defendant Robinson was elected President, the defendant Boyd Vice-President and the plaintiff Second Vice-President and General Manager.

A meeting of the executive was held on the 9th April, at which the plaintiff was authorized to complete the organization by securing offices and office furniture and supplies, including printing matter, and to make out and publish a prospectus, to all of which the plaintiff gave faithful and satisfactory attention.

Up to the 8th May nothing had been said or done with reference to the plaintiff's compensation, other than as stated, and up to this point there was no liability incurred by any one for the plaintiff's services.

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Judgment.

MACDONALD,

J.

On the 8th May a meeting of the directors was held, at which the question of remuneration was discussed and the following resolutions were passed:

"Moved by Mr. Bull, and seconded by Mr. Bawlf, that Mr. Van Hummell be authorized to spend six dollars per share for sale of stock and he be paid five hundred dollars per month as salary to start from first November, 1911. Carried."

"Moved by Mr. Bull, seconded by Mr. Boyd, that the sense of this meeting is that, if the sale of stock under the direction of Mr. Van Hummell is satisfactory to the board, they will vote him a bonus additional. Carried."

The bonus addition the plaintiff understood to be whatever amount he could make out of the six dollars per share allowed for selling stock, although there was no reference to this at the meeting; but the plaintiff claims this was his understanding with the defendant Robinson after the meeting. But he was uneasy in mind and not satisfied with the assurance he had and was advised by one of the directors to learn the meaning of this resolution, and he then called upon several other shareholders and directors, and they individually agreed that the additional compensation should be as desired by the plaintiff. He then called upon the defendant Robinson, who expressed disapproval of his conduct in the interviews mentioned and, at a meeting of the directors on the 20th May, the following resolution was passed:

"Moved by Mr. Persse and seconded by Mr. Boyd, that that portion of the minutes of the previous meeting re remuneration for sale of stock be rescinded and the following substituted: That Mr. Van Hummell be engaged as manager at a salary at five hundred dollars per month to date from first November, 1911, and that the sale of stock be proceeded with and that the manager consult with the President and Vice-President as to the details of same. Carried."

On the 23rd May, the plaintiff by letter to the President and board of directors rejected the proposition con-

tained in the above resolution, and made counter-proposals, which were in turn rejected by the defendants, and the following resolution passed:

"That the resolution of the directors passed at the meeting held on the 20th May inst. as to the acknowledgment and remuneration of Mr. Van Hummell be rescinded, he having refused to accept same."

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MACDONALD,  
J.

From these facts it is clear that the plaintiff was not engaged by the Company after its incorporation, unless the resolution of the 8th May has that effect. But the question arises, who is responsible for compensation for his services prior to the 8th day of May.

I fail to find any liability on the part of any of the personal defendants. True there were a number of interviews with some of those defendants, and the question of remuneration discussed; but there never was any pretence of any undertaking by any one of them to become personally liable. The discussions were all as to what would be done by the Company and, as the Company was then controlled by these defendants, much was taken for granted.

I grant a non-suit as to all the personal defendants, and enter a verdict for the defendant Atchison on his counterclaim for \$1,250 with interest at five per cent per annum, and to the defendant Robinson on his counterclaim for \$1,000, with interest at the same rate.

On hearing further evidence and argument, I refuse the non-suit as to the defendant Company.

As to the liability of the defendant Company for wrongful dismissal and breach of contract, there can be no liability, as the contract submitted by the Company was rejected by the plaintiff and none other was made. The liability for his services promoting the Company and securing stock subscriptions, with his claim to wages for the time he was in employ of the Company, are the only points remaining for consideration.

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Judgment.

MACDONALD,  
J.

The law seems clear that a promoter has no right of indemnity against the Company which he promotes in respect of any obligation undertaken on its behalf before its incorporation, nor can he claim upon any agreement made in its behalf by an agent or trustee before incorporation. "Nor is the promoter or a person employed by him entitled to sue the company in respect of any payment for services rendered or expenses incurred before its incorporation in promoting it, unless after its incorporation it expressly agrees with him to make such payment or from other facts the Court can infer a new contract to reimburse him.

"Nor is a company bound in equity to pay the preliminary expenses because it has adopted and derived benefit from services previous to its incorporation." 5 *Halsbury, Laws of England*, 56.

"A promoter cannot claim from the company he promotes any payment for his services or expenses in promoting it unless, in the case of a company incorporated by special Act or charter, the Act or charter so provides, or unless the company after its incorporation agrees with him to make such payment or *semble* takes the benefit of his services or expenditure." *Hamilton's Company Law*, 69.

The Act incorporating the defendant Company makes no provision for payment of these expenses, nor is this a case in which the Company could be bound because of its acceptance of the benefits of the services rendered and therefore an equitable liability falling upon it: *In re National Motor Mail Coach Co., Ltd. (Clinton's claim)*, [1908] 2 Ch. 515.

The personal defendants, as well as the plaintiff, were the projectors of the Company, and in a sense the promoters. None of them undertook personally any liability other than as subscribing shareholders.

"In the absence of an express contract one of several promoters cannot sue another for remuneration for promoting services." *Holmes v. Higgins*, (1822) 1 B. & C. 74.

It was the intention that the expenses connected with the incorporation would be paid by the Company after its incorporation and, if things had gone on smoothly and the Company entered upon business, no doubt they would have been; but the Company did not commence business, stock subscriptions were not paid, nor any part of them, and the trouble with the plaintiff, it would seem, contributed to these results.

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MACDONALD,  
J.

The plaintiff relies on the resolutions of the 8th and 20th May as an adoption by the Company of the understanding with the promoters to compensate him and as constituting an agreement to do so.

A company cannot ratify a contract which was made by its promoters when the company was not in existence: *In re Empress Engineering Co.*, 16 Ch.D. 125.

But an agreement entered into between certain individuals before a company is formed can be adopted by the company after it is formed: *Spiller v. Paris Skating Rink Co.*, 7 Ch.D. 368; *Touche v. Met. Ry. Warehousing Co.*, 4 L.R. 6 Ch. 671.

In the latter case the articles of association provided for promotion expenses, and the company, when incorporated, agreed to the payment for such expenses.

Without the resolutions referred to there is nothing to evidence an adoption, nor do I think that these resolutions can have that effect so as to make the Company liable to the plaintiff for promoting expenses. It is to secure his services as manager of the Company and, in consideration of securing him as such, that they provide for his salary, dating back in order to compensate him for his previous services. It is not likely the Company would so compensate the plaintiff if they were not securing a continuation of his services, as the success of the undertaking was largely dependent on him, and his refusal to accept the proposition made would justify the

1913 Company in rescinding the resolutions and dispensing  
Judgment. with his further services.

MACDONALD, J. He was engaged, however, as general manager on the  
1st April, 1912, and continued as such until the 29th  
May, and during that time he worked for the Company  
and is entitled to compensation for that time.

It is well established that a director cannot take the  
benefit of a contract entered into between himself and  
the Company in such cases as that of *Albion v. Martin*,  
1 Ch.D. 580, cited by counsel for the defendant Com-  
pany; but the principle in such cases is not applicable  
here.

The case of *Birney v. Toronto Milk Co.*, 5 O.L.R. 1,  
is strongly relied upon by the defendant Company. That  
case is, however, governed by The Ontario Companies  
Act, R.S.O. 1897, c. 191, s. 47, which provides that a  
contract, such as the engaging of a manager, must be  
by by-law. There is no such provision applicable here.

I do not think the circumstances of this case to be  
within the mischief to which the principle of law was  
intended to be supplied.

It seems to me the appointment of one of the directors  
as manager of the Company is more in the interests of  
the Company than the appointment of some one having  
no interest in it.

There will be judgment against the defendant Com-  
pany for \$1,000, together with costs, and judgment for  
the personal defendants for \$3,064.60, being the amount  
assigned to them by the Northern Crown Bank as repre-  
senting the plaintiff's indebtedness to the Bank, also  
with costs.

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## MCMEANS V. KIDDER.

Before CURRAN, J.

*Vendor and purchaser—Misrepresentation—Rescission of Contract—Innocent mistake.*

Action by vendor for balance due under an agreement of sale of a lot fronting on the Winnipeg River. The purchaser asked for rescission of the agreement on the ground of misrepresentation by the vendor and for the return of the money already paid.

According to the findings of fact, the defendant told the plaintiff he wished to purchase a lot having a sandy beach fronting on the river and the plaintiff personally showed him such a lot, stating that it was his, whereupon the defendant, relying on these statements, agreed to purchase the lot at a named price. The lot described in the agreement subsequently entered into, however, had no sandy beach on it.

*Held*, that the plaintiff's statements and representations were material to the contract, and, being untrue although perhaps innocently made, the defendant was entitled, in equity, upon discovery of their falseness, to have the contract, which was still an executory one, set aside and his payments returned to him, with interest.

*Wolfe v. McArthur*, (1907) 18 M. R. 30, followed.

DECIDED: 4th April, 1913.

ACTION to recover the balance due upon a sale of land to the defendant. The defendant alleged fraud and misrepresentation, and asked by way of counterclaim for cancellation of the agreement of sale, and for repayment by the plaintiff to him of all moneys paid by the defendant under the agreement. Statement

*E. D'H. McMeans* for plaintiff.

*P. C. Locke* for defendant.

CURRAN, J. The agreement of sale is admitted, also the balance of purchase money due under it. The plaintiff will be entitled to judgment unless effect can be given to the defence of fraud and misrepresentation inducing the contract set up by the defendant.

The plaintiff was familiar with the locality and the position and description of the lands mentioned in the agreement of sale, whereas the defendant was not, and

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Judgment.  
CURREN,  
J.

in fact had no knowledge of the locality whatever. The parties were not, therefore, on equal terms in point of knowledge of the subject matter of the agreement.

The facts sworn to by the defendant are that he went out to Minaki in the early part of July, 1911, with the intention of buying some property fronting on the Winnipeg River near Holst Point, if such a property could be got, having a sandy beach on the river front. This adjunct seems to have been the predominating idea in his mind. He says: "I went to Minaki to get property with a sandy beach, if possible, met plaintiff, who said he had some property which would fill what I was after." Whereupon the plaintiff took the defendant in his launch to see the property which the plaintiff said he had in the locality for sale. They landed below the plaintiff's property owing to low water and walked back some distance till they came to a river frontage having a strip of sand or sandy beach, as the plaintiff says, 30 or 40 feet wide by about 15 feet across and running to the water's edge. While there some movements were gone through by the plaintiff, apparently with a view of indicating to the defendant some of the boundaries of his property. The defendant says the plaintiff stood on the shore line and directed him to walk inward where he would find a stake. This stake the defendant failed to find, when the plaintiff came over to where he was and showed him the stake, stood him at it and then returned to the shore line, saying to the defendant "The line of the property ran between me and him; that leaves between 30 and 40 feet on his (plaintiff's) property." The defendant then rejoined the plaintiff, who took a pole and waded out into the water, using it to show the defendant the firm quality of the sand. The two then went eastward to the adjoining location, walking across a narrow peninsula to reach it, and came to another beach which was of muddy formation. The defendant swears the plaintiff did this



to show him by way of contrast the advantages of the plaintiff's land and beach over that of the adjoining land.

None of these statements of the defendant is denied by the plaintiff in any material point.

The defendant was satisfied with the property the plaintiff showed him and that same day took an option of purchase at \$600 (Exhibit 3) on what he supposed was the land the plaintiff had first shown him, and having the sandy beach upon it. This land was described by the plaintiff in the option as Lots 6 and 7, S. 1025, Winnipeg River. Defendant returned to Winnipeg and the agreement of sale (Exhibit 1) was prepared and executed by both parties and the defendant paid over the cash payment of \$150. The lots are more formally described in this document, Exhibit 1, but they are admitted to be the same lots as are described in the option, Exhibit 3.

Before the second payment became due the defendant says he heard that the beach he had seen was not on the plaintiff's property, and he went to the plaintiff and told him what he had heard. He says the plaintiff assured him the beach was as represented, and the defendant, on the strength of this assurance, paid the second instalment of purchase money and interest, amounting to \$154.50.

The plaintiff subsequently passed a sight draft upon the defendant for the third payment and interest, which the defendant refused because, as he says, he kept hearing reports that the beach was not on the property he had agreed to buy.

No further payments were made, and the defendant, in July, 1912, employed a surveyor, one Albert Meekin, to go out and locate the land described in the agreement of sale, Exhibit 1. This was done and the result is detailed in the examination of this surveyor taken *de bene esse*, Exhibit 7, and used by consent at the trial. A sketch or plan was made by the surveyor, Exhibit 8. It is clear from the surveyor's evidence that there is no sand

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J.

beach whatever on the property mentioned in the agreement of sale, Exhibit 1, and that there is considerable sandy beach on the adjoining property to the west, known as Location S. 803.

From the defendant's account of their movements on the day of the sale and looking at Exhibit 10, made by the plaintiff himself, it would seem almost beyond question that the beach the defendant saw was on Location S. 803, and that when they walked eastward, as the defendant says they did, across the narrow peninsula to the muddy beach of the adjoining location, they actually came to Location S. 1025, which immediately adjoins S. 803 on the east and also fronts on the river.

It is possible that the plaintiff himself was mistaken and honestly thought he had shown the defendant the property he did in fact own and that the beach in question was on it. It is unnecessary that the representation made in this respect should be intentionally false to entitle the defendant to relief, if in fact the defendant was misled and deceived by it.

The defendant does not say the plaintiff made any statement or representation as to the exact amount of beach on this property exhibited, except that the indicated boundaries before referred to would leave between 30 and 40 feet on the plaintiff's property. This was what the defendant saw and was satisfied with and is, I find, a material representation on the faith of which the defendant agreed to buy.

The plaintiff does not deny any material part of the defendant's evidence. It is true he says he told the defendant that "No one down there owned the beach, but that it belonged to the Government," and that he did not suggest to the defendant that there were 30 or 40 feet of beach, *because there was not that quantity*; but he does not deny the defendant's story as to what took

place when the boundary line was indicated by the plaintiff as before stated.

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The defendant further says that he understood the property ran right down to the water's edge. The plaintiff, however, says that he told the defendant that this was not the case as there was a road along the river front. The Crown patent, Exhibit 9, reserves an allowance of one chain in perpendicular width for a road along the shore of the Winnipeg River, which renders it impossible for the plaintiff to give title to the land to the water's edge. Nothing turns upon this, as the statement of defence does not set it up as a ground of defence. If the road in question took up the entire beach which the defendant thought he was getting this would not necessarily interfere with the defendant's enjoyment of the beach, if it was situated where the defendant thought it was.

The plaintiff called a witness to prove that the Winnipeg River in 1911 was about 22 inches lower than in 1912. The purchase was made in 1911 and the surveyor's examination of the property was not made until 1912, and it is suggested by the plaintiff that the higher water in 1912 might easily cover up the part of the beach which was visible in 1911 as the land was flat and easily covered with water. The plaintiff, however, admits in his evidence that there was no sand beach on Location S. 1025, because the sand did not run that far back and the evidence clearly shows that there was considerable sandy beach on Location S. 803. I do not think that the evidence as to the water being higher in 1912 than it was in 1911, when the property was bought, sufficiently explains the entire absence of any sandy beach being visible to the surveyor in the summer of 1912, and apparently, in view of the plaintiff's statement that there was no sand beach at all upon Location S. 1025, I do not see that the question of the water being higher or lower makes any difference.

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Judgment.

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J.

I think I can fairly hold upon the evidence, and do hold, that the defendant was misled by the plaintiff's statements, conduct and actions on the day in question when the property was sold to him, into supposing that he was actually buying the property fronting on the Winnipeg River, where the sandy beach in question was, and that he purchased the property mentioned in Exhibit 1 on the faith of the plaintiff's statements and actions on the premises. I hold upon the evidence that the plaintiff's statements and representations as to the beach were material to the contract, induced it and were untrue.

Whether such statements and representations were innocently or falsely made, I think is immaterial. The defendant was deceived by them to his detriment and the contract brought about by such methods cannot in equity be allowed to stand. The transaction is still an executory one and is subject to these equitable principles.

I do not find that any fraud was made use of to induce the defendant to buy the land and to execute the agreement of sale. The plaintiff's representations, nevertheless, were false, though perhaps innocently made, and that is sufficient to give the deceived party the right, in equity, to have the transaction set aside: *Wolfe v. McArthur*, 18 M.R. 30.

The evidence disclosed that sandy beaches were scarce at Minaki and any frontage possessing such an advantage was correspondingly more desirable and valuable. Whether the plaintiff designedly deceived the defendant or was honestly mistaken himself, the result to the defendant is the same and the plaintiff ought not to succeed in his action.

I dismiss the plaintiff's action with costs and there will be judgment for the defendant upon the counterclaim for cancellation of the agreement of sale and for repayment by the plaintiff to the defendant of all moneys

paid by the defendant under such agreement, with interest at the legal rate.

If the parties cannot agree upon this amount, I will, upon application, fix it. The defendant is entitled to the costs of his defence of the action and of the counterclaim, and I allow the costs of the examination *de bene esse* of the witness Meekin.

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Judgment.  
CURRAN,  
J.

### MEIGHEN v. COUCH.

Before MACDONALD, J.

*Vendor and purchaser—Vendor unable to make title—Damages for loss of bargain—Specific performance—Cy-pres doctrine.*

Defendant, a widow, entered into an agreement to sell the land in question to the plaintiff, believing that she had a right to sell it. On discovering that the land belonged to the estate of her deceased husband and that she could not make title to it, she at once notified the plaintiff to that effect.

*Held*, that damages could not be awarded to the plaintiff for the loss of his bargain in lieu of specific performance.

*Bain v. Fothergill*, (1873) L.R. 7 H.L. 158, followed.

*Held*, also, that the plaintiff was not entitled to an order that the defendant should convey the interest she had with an abatement of the purchase money as, until the debts of the estate are paid, it would be impossible to ascertain what that interest was.

DECIDED: 10th March, 1913.

By an agreement made through correspondence commencing in May, 1910, and ending on 2nd June, 1910, the defendant agreed to sell to the plaintiff the northeast quarter and the east half of the northwest quarter of section two in Township ten, Range eight, west of the Principal Meridian in Manitoba. Statement

This action was brought for specific performance.

*W. J. Cooper, K.C.*, for plaintiff cited *Hooper v. Smart*, L.R. 18 Eq. 683; *Kennedy v. Spence*, 24 O.L.R. 535; *Gottesman v. Werner*, 3 D.L.R. 297; *Mansfield v. Toronto General Trusts Cor.*, 22 M.R. 49; *West v.*

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*Lynch*, 5 M.R. 167; *Bailey v. Piper*, L.R. 18 Eq. 683; *Barnes v. Wood*, L.R. 8 Eq. 424; *Wheatley v. Slade*, 4 Sim. 126; *Maw v. Topham*, 19 Beav. 576; *Jones v. Evans*, 12 Jur. 664, and *Bain v. Fothergill*, L.R. 7 H.L. 158.

*J. E. Adamson* for defendant cited *McDougall v. Gagnon*, 16 M.R. 232; *In re Shepard*, 43 Ch. D. 131; *Bristol, etc., Co. v. Maggs*, 44 Ch. D. 616; *Clayton v. Leech*, 41 Ch. D. 103, and *Gray v. Fowler*, L.R. 8 Ex. 249.

MACDONALD, J. On the 10th June, 1910, the defendant having, between the 2nd and 10th June, discovered that the land did not belong to her, but to the estate of her deceased husband, wrote the plaintiff advising him of the fact, and that she was told she could not sell it, and stating that she wished to sell for the purpose of clearing up a debt on the estate. She was the administratrix of the estate in Saskatchewan, where she resided, but administration of the estate in Manitoba had not been applied for.

No further correspondence followed between the plaintiff and the defendant excepting through her solicitors in Saskatchewan, and on 23rd July, 1912, the plaintiff brings action for specific performance of the agreement contained in the correspondence referred to and, in the alternative, damages for breach of the said agreement.

By her statement of defence the defendant (*inter alia*) denies the agreement to sell and sets up the Statute of Frauds as a defence. She also sets up that she is not and never was the owner of the lands, and that she cannot make title, and further that, if such a contract was entered into by her, it was by mistake or error and ignorance as to ownership and authority and power in connection therewith.

The correspondence to my mind forms a complete agreement. It is strongly urged by counsel for the defend-

ant that, by the letter of the 10th June, 1910, the terms were not concluded, but I take it they were. The plaintiff, in reply to the acceptance of his offer by the defendant by which she says terms cash or equivalent, says: "I take this to mean terms cash, unless we can agree on other terms mutually satisfactory, and this is, of course, all right so far as I. am concerned. If we cannot agree I will pay cash." This then completed the agreement, as the payment was to be cash if the equivalent could not be arranged.

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From the facts as above stated specific performance as claimed is not possible, as the defendant has no title to convey. Her prompt action in advising the plaintiff of the condition of the title seems to me an answer to any suggestion of improper conduct on her part. The evidence disposes of any question of fraud. The agreement as stated was by correspondence. There was no representation as to the title. The defendant could make no provision for compensation. I believe she was honest in the belief that on the death of her husband she could deal with the property and, upon discovery of her mistake, she immediately advised the plaintiff. As the widow, it is urged that she is the owner of one-third interest in the property, and that, to the extent of this interest, she should be ordered to convey. It is true she is entitled as the widow to one-third of the estate after payment of debts. She has no ascertained or fixed interest in this land, and it is impossible until the debts of the estate are paid to know what her interest may be. So that the *cy-pres* principle cannot be invoked. I doubt if, indeed, it could even were she the absolute owner of a one-third interest, such interest being so out of proportion to the entirety.

Now, as to compensation, it is well established that in a case of this kind, following the doctrine laid down in *Bain v. Fothergill*, L.R. 7 H L. 158, a purchaser is not

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MACDONALD, J. The action must be dismissed with costs.

### McINNIS FARMS V. MCKENZIE.

Before CURRAN, J.

*Vendor and purchaser—Specific performance—Statute of Frauds—Part performance—Administration of estates—Devolution of Estates Act, R.S.M. 1902, c. 21, s. 25 added by 5 & 6 Edw. VII, c. 21, s. 1.*

Specific performance of an agreement contained in certain letters signed by one of the two defendants, who were the administrators of an estate, to sell land belonging to the estate of the deceased to one Donald McInnis refused for the following reasons:

1. The letters did not definitely fix the amounts of the deferred payments, or the times when such payments were to be made, the expression used being "the balance (\$16,000) to be paid out of the crop from the farm at the rate of about \$2,500 a year."
2. The offer to sell had not been signed by the other administrator and he had not in any way authorized the sale.  
*Gibb v. McMahon*, (1905) 9 O.L.R. 522, 37 S.C.R. 362, followed.
3. For these reasons the Statute of Frauds would prevent the enforcement of the alleged contract.
4. The offer to sell was not made to the plaintiff company or accepted by it or on its behalf and it was in no way obligated by, or concerned in, the proposed sale to McInnis.
5. Under section 25 of the Devolution of Estates Act, R.S.M. 1902, c. 21, added by section 1 of chapter 21 of 5 & 6 Edw. VII, as there was a non-concurring adult interested, viz. the daughter of the deceased, a sale, even if made by both the administrators, would not be valid without the approval of the Registrar General which had not been obtained.
6. That Donald McInnis was tenant of the property for some years and until after the negotiations for the purchase, and had made improvements on it on the strength of his purchasing it, could not be relied on as acts of part performance to take the case out of the Statute of Frauds, as neither of the defendants knew anything about the improvements and there was no previous contract between the plaintiff and the defendants to which these acts could be referable.  
*Maddison v. Alderson*, (1883) 8 A. C. 479, 480, followed.

DECIDED: 11th April, 1913.



THIS action was brought for specific performance of an alleged agreement for the sale by the defendants Margaret E. McKenzie and John McLean, the administrators of Alexander McLean, deceased, to the plaintiff of the east half of section 9 and the west half of section 10, both in Township 13, Range 8, West of the Principal Meridian in the Province of Manitoba.

*D. A. Stacpoole* and *L. J. Elliott* for the plaintiffs.

*E. Anderson, K.C.*, and *E. Frith* for the defendants.

CURRAN, J. The agreement is contained in certain correspondence between the defendant Margaret E. McKenzie and one Donald McInnis, carried on between the 3rd of March, 1911, and the 17th of April, 1912.

The defendants are sued as administrators of Alexander McLean, deceased, but no formal proof of their representative capacity has been adduced.

The defendants deny the alleged agreement, and plead the Statute of Frauds.

The defendant John McLean was called by the plaintiff and swore that his co-defendant, Margaret E. McKenzie, and her daughter, Ernestine McLean, were and are the sole beneficial owners of the land in question which had belonged to Alexander McLean, deceased. The defendant Margaret E. McKenzie is the widow and Ernestine McLean is the daughter of the said Alexander McLean, deceased. The female defendant is now the wife of Adam McKenzie.

The letters relied on by the plaintiff as constituting the contract of sale were admitted by the defendants and put in evidence as Exhibits 1, 2, 4 and 5. Exhibit 1 is a letter dated January 4th, 1912, from Donald McInnis to the female defendant; Exhibit 2 is a letter, prior in point of date to Exhibit 1, and is dated March 3, 1911, from the female defendant to Donald McInnis; Exhibit 4 is a letter, dated March 15th, no year being given,

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from the female defendant to Donald McInnis, supposed to be a reply to Exhibit 1, and I think I may fairly assume that it is a reply to this Exhibit; Exhibit 5 is an admitted copy of a letter, dated April 17th, 1912, from the plaintiff's solicitors to the female defendant, and which the plaintiff relies upon as an acceptance of the alleged offer to sell at the price and upon the terms contained in Exhibit 4. The subsequent correspondence is all between solicitors and relates to the formalities of completing the alleged sale.

It was admitted, subject to objection of defendant's counsel, that it was not evidence for or against anyone, and I am inclined to think that, under the circumstances, the objection was well taken; but in the view I take of the case it is not necessary for me to look at these letters, and I, therefore, disregard them in forming my conclusion.

The plaintiff is a company incorporated under the laws of Manitoba; but no evidence was given of the purposes, objects or powers of the company. Its title, however, indicates that it is a farming corporation, and I think I am justified in inferring that such a contract as the one in question, if made with the plaintiff company, was one that was fairly within its corporate powers, particularly as no defence is raised suggesting that such a transaction was *ultra vires*. But was the alleged agreement made with the plaintiff company or even on its behalf?

Let us examine the letters. The first in point of date is Exhibit 2, a letter from the female defendant to D. McInnis, dated March 3, 1911. The only material part of this letter, if indeed it can be said to be either material or relevant, is as follows;

"Re selling the Macdonald farm, I have written my daughter re same. She is satisfied with whatever I think best, and Mr. McKenzie has told you that as far

as I was concerned that I was. Kindly let me know what amount you would pay down." This letter apparently relates to the land in question and I think refers to some negotiations in the fall of 1910 between McInnis and Adam McKenzie, the husband of the female defendant (see part of McInnis' examination for discovery put in as part of plaintiff's case by consent, page 5), and which negotiations did not result in anything.

The next letter is Exhibit 1, from McInnis to the female defendant, and is as follows:

Toronto, Jan. 4th, 1912.

Mrs. A. McKenzie, Camaguay, Cuba.

Dear Mrs. McKenzie—

I have talked the matter of buying the farm at Macdonald, Man., over with my partners. We have decided we would like to buy it and we would pay one-quarter down, \$6,000, and you make the deed over to us in the name of the McInnis Farms, Ltd., and we will give you a mortgage on the farm for the balance, \$18,000, at 6 per cent interest. We to make such payments as we can each year, or about \$2,500 per year until paid off, when we will receive the deed. We could not see our way for much larger cash outlay owing to the land being dirty.

Wishing to hear from you as soon as possible and trusting you are well. Write to

Yours truly,

D. McInnis,

34 Dundonald St., Toronto, Ont.

To this letter the female defendant replied, apparently by Exhibit 4, which is as follows:

D. McInnis, Esq., Macdonald, Man.

Dear Sir—

In answer to your letter about buying McLean farm, I wish to tell you that we will sell it for \$24,000, one-third cash and the balance to be paid out of the crops as you suggest, at 7 per cent. interest.

Sincerely yours,

Margaret E. McKenzie.

Mar. 15th, Le Pas, Camaguay, Cuba.

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On April 17th, 1912, this offer was accepted in terms by the letter of which Exhibit 5 is a copy, and is as follows:

April 17th, 1912.

Margaret E. McKenzie, Le Pas, Camaguay, Cuba, W.I.  
Dear Madam—

On behalf of D. McInnis, we beg to state that he accepts your offer contained in your letter of March 15th, 1912, to sell the McLean farm, namely the East half of section 9 and the West half of section 10 in Township 13, and Range 8, West of the First Meridian in the Province of Manitoba, for the sum of \$24,000—one-third cash and the balance to be paid out of the crop from the farm at the rate of about \$2,500 a year, with interest at 7 per cent.

We understand that Mr. Edward Anderson is acting as solicitor for the estate. We have, therefore, communicated with Mr. Anderson and have asked him to take the matter up for the estate in order that it may be closed out. You will, no doubt, hear from Mr. Anderson.

Yours truly,

Sharpe, Stacpoole, Elliott & Montague.

There was no answer to this letter from the female defendant and the subsequent correspondence, as before indicated, was wholly between the solicitors and relates to matters of title and the conveyances necessary for carrying out the proposed sale. It appears that deeds were prepared by Mr. Anderson, acting for the estate, and a mortgage back by the plaintiff's solicitors. The deeds were sent by Mr. Anderson to the female defendant to her Cuban address and returned by her husband, Adam McKenzie, unexecuted by her, as she had left there for Manitoba.

There was no personal interview with the female defendant, and admittedly McInnis never discussed the question of the purchase with the male defendant, who has not signed anything in the way of letters, agreement or deed, in connection with the alleged purchase. Whatever information he had about the alleged sale was

derived from McInnis and Mr. Anderson, and Mr. Anderson's knowledge was seemingly derived from the same source, McInnis.

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The female defendant and her daughter, Ernestine McLean, returned from Cuba sometime in the summer or fall of 1912, and in October of that year the daughter, in the presence of her mother, the female defendant, instructed defendant McLean not to sign the deeds of the farm as she was not satisfied with the proposed sale, and for this reason the transaction was not carried out.

I do not think the plaintiff has made out an agreement in writing for the sale of the lands in question sufficient to satisfy the Statute of Frauds, and upon which the personal representatives of the estate of the deceased Alexander McLean can be charged. These representatives are the only persons who could legally sell or agree to sell these lands. The letters in question at most establish a contract between the female defendant personally and Donald McInnis personally; but not a contract in form sufficient to satisfy the Statute of Frauds, because such letters do not fix definitely the amounts of the deferred payments, or the times when such payments were to be made. These are material terms of the agreement, which must be definitely settled and stated in the written instrument or correspondence which constitutes the memorandum required by the Statute of Frauds. Again, the offer to sell, Exhibit 4, is not signed by a person who had the sole legal right to sell the land. To be binding upon the estate this offer should have been signed by both of the personal representatives of the deceased Alexander McLean. It is signed by the one only, and is therefore non-enforceable against the estate: *Gibb v. McMahon*, 9 O.L.R. 522, affirmed 37 S.C.R. 362.

Again, the acceptance, Exhibit 5, is not that of the

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plaintiff company or on its behalf, but is an acceptance on behalf of D. McInnis of an offer to sell, made to him personally by the female defendant. The offer was not made to the plaintiff company nor accepted by it. The plaintiff company is in no way obligated by or concerned in the proposals made and accepted by McInnis further than may be inferred from his request in Exhibit 1 to have the conveyance made in its name.

The defendants furthermore rely upon the provisions of The Devolution of Estates Act, as amended by section 1 of c. 21 of 5 and 6 Edward VII, Statutes of 1906. I read this section as limiting the power of administrators in whom land of a deceased person is vested to sell when there are no debts and there are adult heirs who do not concur in the sale, or where there are infants interested. Here there is either an infant or a non-concurring adult interested, Ernestine McLean. If, under these circumstances, both the administrators had made a sale, such sale would not, by the terms of this enactment, be valid unless made with the approval of the Registrar-General which, it is admitted, was not obtained.

The plaintiff relied upon certain acts of part performance as taking the case out of the Statute. It appears that Donald McInnis had been tenant of the lands in question under a written lease, Exhibit 21, for one year from November 1st, 1909, to November 1st, 1910; that he continued as such tenant for the next succeeding year under an arrangement with the landlord, and was still in possession as tenant when the negotiations for purchase took place. The improvements were made and done by Donald McInnis in 1912, at what dates does not appear. He swears that they were done on the condition that "we (the company) were purchasing the farm," and that they would not have been done if there had not been a purchase of the land.

This is not enough. He admits that the female de-

fendant had no notice or knowledge of these improvements, and the defendant McLean swears he did not know of them, and he is not contradicted upon this point. Acts of part performance must in all cases be done by the person asserting the contract with the knowledge of the person sought to be charged that the acts are being done and are being done on the faith of the contract: *Fry on Specific Performance*, section 588. Again, to make the acts of part performance effective to take the contract out of the Statute of Frauds, they must be consistent with the contract alleged, and also such as cannot be referred to any other title than a contract, nor have been done with any other view or design than to perform a contract: *Fry on Specific Performance*, section 584; *Maddison v. Alderson*, 8 A.C. 479 and 480.

This statement of the law assumes the existence of a previous contract and that the acts of part performance were done solely with reference to that contract and with the knowledge of the party sought to be charged. I cannot find that such was the case here. The acts relied on were done without the knowledge of the defendants. There was no previous contract or agreement between the plaintiff and the defendants to which these acts could be referable. The only transaction in the nature of a contract of sale proved was that contained in the correspondence before referred to, and this at most established an attempted sale by one of two administrators to D. McInnis personally. The plaintiff company has not established an enforceable contract of sale upon which the personal representatives of Alexander McLean, deceased, can be held or charged, and must fail in their action.

There will be judgment dismissing the plaintiff's action with costs, which will include the costs of any examinations for discovery.

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## COURT OF APPEAL.

## TREMBLAY v. DUSSAULT.

Before HOWELL, C.J.M., PERDUE, CAMERON and HAGGART, JJ.A.

*Vendor and purchaser—Statute of Frauds—Specific performance—Principal and agent—Real Property Act—Caveat.*

A memorandum in writing as to a sale of land signed by a person styling himself agent for the owners, but not mentioning the owners' name, is not sufficient to satisfy the Statute of Frauds, unless such agent had authority to act for and represent the owner in the matter of the sale: *Rossiter v. Miller*, (1878) 3 A. C. 1140, *Fry on Specific Performance*, p. 181, and *Maber v. Penskalaki* (1904) 15 M. R. 236.

When one of several joint owners of land assumes to make a sale of the land subject to the approval of the owners and such approval is not obtained, the purchaser cannot have specific performance against the person with whom he dealt in respect of such person's partial interest in the land, if he knew at the time that such person had only such partial interest.

One of several joint owners of land gave a purchaser a receipt for a deposit on account of a proposed sale of the land "subject to approval of owners," but the owners did not approve.

*Held*, that the purchaser acquired no interest in the land on which to found a caveat which he had registered under the Real Property Act and that such caveat should be vacated and set aside.

DECIDED: 14th April, 1913.

Statement      THIS action was brought by the plaintiff to remove a caveat filed by the defendant in the Winnipeg Land Titles Office against Lot 9, in Block 4, according to a plan of survey of the Roman Catholic Mission property, registered in the Winnipeg Land Titles Office as Plan No. 433, and for a declaration that there was no contract or agreement between the plaintiffs and defendant for the sale of the land to the defendant, and for damages.

The defendant alleged a valid sale to him of the land and counterclaimed for specific performance, and in the alternative, if it be found that all of the plaintiffs were not bound by the alleged sale, for a declaration that the plaintiff Deniset was so bound as to his interest in the land, and for specific performance in that alternative against him.



The plaintiffs set up defences to the counterclaim, denying the alleged sale to the defendant; that specific performance was impossible, owing to the sale of the land having been made to third parties, and the Statute of Frauds. 1913  
Statement.

The following judgment at the trial was delivered by

CURRAN, J. The statement of claim was issued on the 27th September, 1912, and at that date the plaintiffs were the registered owners of the lands in question under certificate of title No. 190152 of the Winnipeg Land Titles Office in the following interests: The plaintiff Company, an undivided one-half interest; the plaintiff Gevaert, an undivided one-quarter interest, and the plaintiff Deniset, the remaining one-quarter interest—subject to a certain mortgage, and to the defendant's caveat, which was registered on the 16th July, 1912, as No. 60992, and this is the caveat which the plaintiffs seek to have removed.

By consent of parties copies of the certificate of title, the caveat and the plan were put in. The certificate of title is Exhibit 1, the caveat is Exhibit 3 and the plan is Exhibit 12.

The plaintiffs, as the registered owners, under the Real Property Act, of the land in question, are entitled to succeed, unless the defendant can make good his position as a purchaser of this land under a valid agreement of sale from the plaintiffs.

The caveat complained of is based upon, to quote from the caveat itself, "a short agreement in writing (by way of receipt) dated the 10th day of May, 1912," etc. This is the receipt, Exhibit 5, referred to in the pleadings, and is the agreement of sale relied upon by the defendant. For convenience, I set out the receipt in full:

"St. Boniface, Man., May 10th 1912.

Received from J. Camille Dussault, the sum of twenty-five Dollars.

Deposit on purchase price of Lot Nine, Block 4, Block 314, R.C.M.P., Plan 433.

Price \$1,063.70. Cash 1/4.

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Balance 6, 12, 18, 24, 30 and 36 months.

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This receipt subject to owner's approval.

\$25/100. Per F. Deniset."

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The plaintiffs allege that this receipt is not binding on them and does not comply with the Statute of Frauds, and, in any event, that it is, by its terms, subject to the owners' approval, and not binding unless and until the owners do approve. As a matter of fact it was not approved by the plaintiff the J. H. Tremblay Co. and the plaintiff Gevaert. The evidence shows that, almost immediately after their becoming aware of the defendant's offer for the land embodied in this receipt, they rejected it, and in due course notice of this fact was communicated to the defendant verbally and also by letter, and the cheque for \$25 received by the plaintiff Deniset as a deposit on the land was returned to the defendant.

The facts leading up to the giving of Exhibit 5 are briefly as follows: The plaintiffs purchased a large tract of land in St. Boniface some time in January, 1912, for the purposes of subdivision and sale. They caused a survey and plan to be prepared and registered, and appointed the firm of Sanford Evans & Co., of Winnipeg, sole agents for the sale of lots. According to the evidence, these agents were required to submit to the plaintiff J. H. Tremblay & Co. for approval any propositions for purchase of lots received by them. If Tremblay & Co. approved, the sales were proceeded with and closed out in the usual way. These agents assumed to appoint the plaintiff Deniset a sub-agent and allowed him a commission of five per cent on all sales he might make, subject of course to the same conditions as to approval as applied to their own agency.

It appears from the evidence of one Black, an employee of the Sanford Evans & Co., that the usual custom was to telephone to, or notify by letter, J. H. Tremblay & Co. of any propositions received by them for the purchase

of lots, and that Tremblay & Co. were supposed to consult with their co-owners as to acceptance of such propositions, but that they did not do so in every case and assumed to authorize sales in some cases without consulting their co-owners.

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The defendant argues from this that, if J. H. Tremblay & Co. had the right to authorize sales, this right was equally exercisable by the other plaintiffs as joint owners of the property. I took it from the argument of the defendant's counsel that he contended that the plaintiffs were in reality partners in this purchase; but I cannot give effect to that view—if that was in reality what counsel contended for. I take it that the plaintiffs were nothing more than joint owners of the property in question and that there would be no implied authority existing between the owners whereby one owner might approve a sale without consultation with his co-owners, although the individual plaintiffs appear to have permitted the plaintiff Company to so approve without complaint on their part.

It does not seem to me material to decide upon this question as, in any event, the plaintiff Deniset, in issuing the receipt, Exhibit 5, took the precaution to make it in express terms subject to owners' approval; and, as this document is put forth by the defendant as the sole ground of his title, I take it that he must abide by it in the terms in which he received it.

Whether or not the plaintiff Deniset had the right to sell without consulting his co-owners, he did not in this case assume to do so. The defendant must rely upon the receipt, Exhibit 5, in the form in which it was issued to him by Deniset. It is the only evidence of the sale in existence, and he cannot add to or detract from its terms in any particular.

According to the evidence of the plaintiff Deniset,

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the defendant met him in Deniset's office in the City of St. Boniface, and had some talk about buying the lot in question. As the result of this the defendant made an offer for the lot, which was accepted by the plaintiff Deniset conditionally upon "his partners," as he expresses it, consenting to the sale. Defendant denies that there was any condition imposed, and disclaims any knowledge of the words found in the receipt—"This receipt subject to owner's approval"—until some time afterwards.

I accept the evidence of the plaintiff Deniset upon this point, if indeed the evidence is admissible at all in view of the written document. It seems to me immaterial what knowledge the defendant then had, as he now comes into Court with this document, puts it forth and relies upon it to establish his title to the property.

What force or effect had Exhibit 5 until approved by the owners of the property? In my opinion clearly none. It conferred no legal right whatever upon the defendant as against the plaintiffs or the land therein referred to until the plaintiffs had in some way expressed their approval of it, or the proposed sale to which it referred. As I said before, this approval two of the plaintiffs, J. H. Tremblay & Co. and Gevaert, have refused, and they promptly rejected the defendant's offer as soon as they learned of it, and caused a notification to this effect to be given to the defendant and his cheque for the deposit of \$25 returned to him.

I hold that the receipt, Exhibit 5, was not a completed memorandum of agreement sufficient to satisfy the Statute of Frauds, but that it was no more than a proposal by the defendant which required acceptance by the plaintiffs to render it binding upon them, and, without acceptance, it had no validity. On the other hand, a memorandum of agreement supposes the two parties to have verbally made a contract with each other; and, when the terms of such contract are reduced into writing and

signed, that is sufficient to bind the parties signing: *Fry on Specific Performance*, p. 139, par. 283.

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Again, it is essential that the contract should express the names of the parties. The receipt in question does not contain the names of the vendors. This appears to be essential: *Fry on Specific Performance*, p. 181, par. 368; *Maber v. Penskalski*, 15 M.R. 236; unless, indeed, such receipt is signed by an agent clothed with authority to act for and represent the owners in the matter of the sale: *Rossiter v. Miller*, 3 A.C. 1140.

A reference to the receipt, Exhibit 5, will show that it is signed "per F. Deniset." For whom Deniset intended to sign does not appear. He was not the sole owner to the defendant's knowledge, as the defendant admits in his evidence that he knew the plaintiff Gevaert had an interest in the land.

I hold upon the evidence that Deniset was not an authorized agent of the plaintiffs having authority to bind them to a sale of this land. Had Deniset possessed such authority, and the receipt had been free from the condition as to approval by owners, it is possible that it might satisfy the requirements of the Statute, and constitute a binding contract of sale, but, as Deniset had not such authority, I am of opinion that the receipt does not comply with the Statute, and that it amounted to nothing more than an offer to purchase upon the terms mentioned, which, of course, required acceptance by the owners before it became binding upon them.

In his capacity as a sub-agent acting under Sanford Evans & Co., and assuming that this firm had authority to so appoint him, the plaintiff Deniset could not commit his principals irrevocably to any sale, but could only sell subject to approval and, as he had no authority to approve for them, I hold that his signing of the receipt in the way in which he did in no way binds them.

The position is therefore this: The receipt in question

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is not signed by the plaintiffs as owners, nor is it signed by the plaintiff Deniset as their duly authorized agent, and in no way does the name of the owner appear in the document, and I think this is essential. As there was, therefore, no completed agreement binding upon the owners to carry out a sale of the lands in question to the defendant, there can be no legal ground upon which the defendant can uphold his caveat. He has in fact no interest in the land in question which entitles him to file a caveat at all.

Next, as to the defendant's contention that he is entitled, in any event, to specific performance against the plaintiff Deniset to the extent of his interest in the land, I do not think I can give effect to it. The principle of law applicable is laid down in *Fry on Specific Performance*, at p. 616, par. 1258:

"If a man, having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under these circumstances is bound by the assertion in his contract; and, if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole."

This case does not fall within the principles of law above laid down. The defendant knew that Deniset was not the sole owner of the property, but that Gevaert at least was jointly interested with him. It is not shown that Deniset held out or represented to the defendant that he was the sole owner of the property or, indeed, what interest in it he had, and the defendant knew that, in whatever capacity Deniset was acting, it was not in that of sole owner.

I think that all that Deniset can be held to in con-

sequence of the receipt which he issued to the defendant is this: that if the proposed sale was satisfactory to his co-owners it would be satisfactory to him; but that, in any event, it must be approved by his co-owners before it becomes binding upon anyone.

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The defendant, therefore, having failed to establish his purchase of the property, is not entitled to maintain his caveat based upon the alleged purchase. There will be judgment for the plaintiffs vacating and setting aside the defendant's caveat and declaring that the defendant has no claim upon or interest in the lands in question as a purchaser thereof from the plaintiffs, and that the agreement for sale set up by the defendant is invalid and of no legal force or effect. The defendant's counterclaim will be dismissed with costs, and the plaintiffs will have their costs of the action as against the defendant.

Defendant appealed.

*A. Dubuc* and *J. Mondor* for defendant.

*H. P. Blackwood* for plaintiffs.

The judgment of the Court was delivered by

CAMERON, J.A. This is an action by the plaintiffs, owners of certain property in St. Boniface, to remove a caveat filed by the defendant, who counterclaimed for specific performance.

The action was tried before Mr. Justice Curran, who gave judgment in favor of the plaintiffs, vacating the caveat and dismissing the counterclaim.

The memorandum on which the caveat was based is in the form of a receipt, which is set forth by the learned trial Judge, and which was given by Deniset, one of the owners, who signed simply "per F. Deniset," and was expressed to be "subject to the owner's approval." The trial Judge finds that Tremblay & Co. and Gevaert, two of the owners, refused to assent to the sale and rejected the defendant's offer as soon as it came to their

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knowledge. This finding establishes as a fact that there was no concluded contract between the parties and the defendant, therefore, must fail. This puts an end to the matter and there is no need of discussing the other questions brought forward on the argument of this appeal.

The defendant's appeal must be dismissed with costs.

*Appeal dismissed.*

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### COURT OF APPEAL.

#### PETERSON V. BITULITHIC AND CONTRACTING CO.

Before HOWELL, C.J.M., PERDUE, CAMERON and HAGGART, J.J.A.

*Highways—Special Survey Act, R.S.M. 1902, c. 158, as amended by 10 Edward VII, c. 62—Estoppel—Costs—Construction of statutes.*

The plaintiffs had title to a piece of land adjoining the westerly boundary of St. Mary's Road. They claimed that the road was only 66 feet wide at that point and erected their fence 33 feet from the centre line of the road, the position of which was not disputed. The defendants contended that the road was 99 feet wide at that point and encroached upon the land inside the plaintiffs' fence to a depth of 16½ feet all along the frontage of the property.

The transfer from the plaintiffs' predecessors in title described the land as commencing on the westerly limit of St. Mary's Road "as the said road is shown on plan 472". That plan showed the width of the road at the point in question to be 99 feet.

*Held*, that the plaintiffs were estopped from claiming title to the strip of land in dispute, whatever may have been the width of the road.

Before the trespasses complained of in this action, proceedings had been taken under the Special Survey Act, R.S.M. 1902, c. 158, as amended by 10 Edward VII, c. 62, and a plan of the survey showing St. Mary's Road as 99 feet wide at the point in question had been duly approved and registered in accordance with the Act.

*Held*, (1) These proceedings had, by virtue of that Act, the effect of vesting the road to the width of 99 feet in the Province with the right of the defendant municipality to exercise jurisdiction over it to the full width and, therefore, to authorize their co-defendants to enter upon and perform work upon it, notwithstanding the possession the plaintiffs had taken of the strip in dispute.

(2) The notice published in the Gazette under the provisions of that



Act, which stated that the plan had been made "for the purpose of correcting errors in prior surveys of the above described portion of the said City and for the purpose of *defining and establishing the location of boundaries of property* within the same," was sufficiently comprehensive to cover the fixing of the width of the road and to authorize the approval by the Lieutenant-Governor-in-Council of the plan, and the registration of the plan became, under sections 15 and 17 of the Act, final and binding upon all parties whatsoever.

- (3) The plan approved under the Special Survey Act should not be treated as an act of expropriation without compensation, but simply as evidence of the location of a boundary line, and that Act, being curative, remedial and beneficial in its purpose, should be construed liberally so as, if possible, to carry out the intention of the Legislature in making certain and defining property rights and eliminating litigation arising from vague and undetermined boundaries.

*St. Vital v. Mager*, (1909) 19 M.R. 293, in which it was decided that the width of the road in question at the adjoining lot was 66 feet, distinguished on the ground that the defendant in that case claimed title through the Hudson's Bay Company which title was not in any way complicated by plan 472 above referred to.

As, however, the plaintiffs here were probably led to enter into possession of the disputed strip of land because of that decision, the Court allowed the appeal without costs and ordered judgment to be entered for the defendants, without costs.

DECIDED: 14th-April, 1913.

IN this action the question at issue was the width of St. Mary's Road, where the same crossed Lot 106 of the Parish of St. Boniface. Statement.

The plaintiff Peterson was the owner of a strip 45 feet wide of this lot, fronting on the above mentioned road. He bought this land in 1909 from his co-plaintiff Guay, and went into possession on the 1st of September in that year. In June of the following year he enclosed this 45-foot strip by a fence which, at the front, was built along a line parallel to and 33 feet distant from the centre line of the road.

The contention of the defendants was that this road was 99 feet wide and extended for  $49\frac{1}{2}$  feet on each side of the centre line and that the plaintiff had consequently inclosed a portion of the highway  $16\frac{1}{2}$  feet wide across the front of his land.

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Statement. In May last the defendant Company was constructing a bitulithic pavement upon St. Mary's Road under a contract from the defendant Municipality. For the purpose of this work the Company removed the fence which the plaintiff had placed along the said road 33 feet from the centre line and commenced to grade a road on the 16½ feet in dispute, but were stopped by an interim injunction.

This action was brought to have the injunction made perpetual and for damages for the trespass already committed.

The following judgment was delivered by

MATHERS, C.J.K.B. The plaintiff was in possession and occupation, and was entitled to hold it against the defendants, unless they had a better right to the possession than he had, the onus of showing which is on them.

The defendants plead that St. Mary's Road is 99 feet wide opposite Lot 106 St. Boniface, and they specially rely on a survey made under the provisions of The Special Survey Act, R.S.M. 1902, c. 158, as establishing the width of this road as 99 feet.

Apart from the proceedings taken under this Act, the defendants have, in my opinion, failed to show that they have any right to interfere with the plaintiff's possession, and they must stand or fall upon the right acquired by such proceedings.

The special survey relied upon was made in the beginning of this present year, and the plan thereof was filed in the Land Titles Office as No. 1871 on the 30th July last.

By this special survey St. Mary's Road is shown of a uniform width of 99 feet, for which purpose 16½ feet in perpendicular depth is taken off the front of the land occupied by the plaintiff.

It was not contended that the Act, as it stood before

the amendment of 1910, gave power to compulsorily take land for the purpose of widening a highway. By that amendment a special survey may be ordered "for the purpose of fixing the location or width of any road or highway." It is contended by the defendants that these words in the statute authorize the taking of a portion of the plaintiff's land.

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MATHERS,  
C.J.

Section 5 of the Act makes provision for a notice to the parties affected by the special survey. The notice must state that the plan has been filed, and also set forth the object of the special survey. In this case a notice was published in the Manitoba Gazette on the 4th of May, 1912. This notice says that a special survey has been made "for the purpose of correcting errors in prior surveys of the above described portion of the said City and for the purpose of defining and establishing the location of boundaries of property within the same."

That notice conveys no intimation of any intention of going further than to correct errors in prior surveys. It gives no intimation of an intention to take land not already included in a street or highway for the purpose of establishing a new width or new boundaries to the highway. No objections were filed pursuant to the notice and in due course an Order-in-Council was passed by the Lieutenant-Governor-in-Council approving of the plan, and a notice was subsequently published of the Order-in-Council.

Section 15 of the Act says, amongst other things, that such notice "when so published shall be conclusive evidence of the Order-in-Council and of the regularity of all proceedings leading up to the passage of such Order-in-Council, and of the approval of the survey and plan and, except in so far as the Order-in-Council may be set aside or varied under the provisions of this Act, such Order-in-Council shall not be set aside on any ground whatever, and such survey and plan shall be thenceforth held to be approved and shall be final and binding upon all parties whatsoever."

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Judgment.  
MATHERS,  
C.J.

This provision cures irregularities leading up to the Order-in-Council, but is an entire failure to state the purpose of the special survey in the notice published under section 5 an irregularity? Its purpose is to let those whose rights or interests may be affected by the survey know what is meant to be accomplished by it, and to afford them an opportunity of stating their objections, if any, before it is approved. The notice published gave no intimation of the real purpose of the survey, viz., to establish an entirely new width to St. Mary's Road, and for that purpose to expropriate the necessary land, but, on the contrary, stated the purpose in a manner calculated to mislead a property owner into the belief that errors in prior surveys were alone to be corrected. In my opinion this defect in the notice is a good deal more than an irregularity and is not cured by section 15.

But I think the plaintiff must succeed on another ground also. In my opinion The Special Survey Act does not authorize the expropriation of land for the purpose of widening a road.

It is presumed, where the objects of the Act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property or to encroach on the rights of persons, and it is therefore expected that, if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication, and beyond reasonable doubt. It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged so to construe it: *Marwell on Statutes*, 427.

The only reference to compensation in The Special Survey Act is in section 13, which provides that the Court of King's Bench or the Court of Appeal might, on an appeal from the Attorney General, award compensation, but by sub-section (a) of that section it is provided that no evidence or other matter shall on such appeal be

adduced or heard other than such as was before the Attorney General.

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Judgment.

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C.J.

Section 12 provides for a hearing by the Attorney General, who is empowered to dispose of the same in such manner as he shall deem just and equitable. But apparently he is under no obligation to award compensation, no matter how much property has been taken.

If the intention of the Legislature was that the property of citizens should be taken under the provisions of this Act, one would expect to find special provision not only for awarding compensation to those injured, but also some method provided for the assessment of such compensation. As no such provisions are to be found in the Act, and as the wording of the Act does not make it clear that such was the legislative intention, I must conclude that it was not intended by this Act to expropriate land for the purpose of widening the road. I am supported in this conclusion by the fact that The Municipal Act contains ample provision for widening highways and, if necessary, expropriating land for that purpose and assessing the compensation to be in such case awarded.

There will be judgment for the plaintiff for the injunction prayed and for damages, which I assess at \$50, and costs of suit.

The defendants The Bitulithic & Contracting Co. appealed.

*H. P. Blackwood* for defendants, appellants.

*Isaac Campbell, K.C.*, for Municipality of St. Vital cited *Heath v. Portage la Prairie*, 18 M.R. 693; *St. Vital v. Mager*, 19 M.R. 293, and *Tobey v. Taunton*, 119 Mass. 410.

*H. M. Hannesson* for plaintiff, respondent, cited *Every v. Smith*, 26 L.J.Ex. 344.

HOWELL, C.J.M. The statement of claim alleges that the plaintiff Guay was the owner of a part of Lot 106

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according to the Dominion Government Survey of the Parish of St. Boniface "lying to the west of the westerly limit of the highway known as St. Mary's Road, which said road is of the width of 66 feet, where the same crosses said Lot 106."

Section 2A of the statement of claim is as follows:

"2A. On or about the said 1st day of September, A.D. 1909, the plaintiff Guay agreed to sell the land before described to the plaintiff Peterson, who therefrom entered into possession thereof, and so continued without disturbance until the happening of the events hereinafter recited."

In paragraph 4 it is alleged that the defendants "entered and trespassed on the lands aforesaid."

At the trial the defendants put in a transfer executed by the trustees of the late Senator Girard to the plaintiff Guay of the portions of this lot lying immediately to the east of this highway and adjoining it on that side, and also a considerable portion of the lot lying immediately to the west of the same highway and adjoining it on the west side. A portion of this latter parcel, the plaintiffs claim, is the land in question in this suit.

The description of the land in the transfer begins as follows:

"All that portion of said Lot 106, commencing on the westerly limit of the St. Mary's Road in the Parish of St. Boniface, as the said Road is shown on plan 472."

Certificates of title by this description were duly issued to Guay.

The defendants also put in at the trial an agreement between the two plaintiffs whereby Guay agreed to sell to Peterson the most northerly 45 feet of the last mentioned parcel; that is the parcel abutting upon that road, but the road is therein described as "shown on a plan registered in the Land Titles Office as No. 606."

On the 28th day of October, 1911, the plaintiff Peter-

son filed a caveat in the Land Titles Office claiming an equitable estate in the land described as in that agreement. 1913  
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HOWELL,  
C.J.M.

At the trial the plaintiff Peterson gave evidence on his own behalf, and I quote portions:

"Q. How long have you owned the property in question? A. Since 1909.

Q. Whom did you buy it from? A. Mr. Abraham Guay.

Q. Your co-plaintiff? A. Yes.

\* \* \* \* \*

Q. You bought the property between the road and the River? A. Yes.

Q. Do you know St. Mary's Road? A. Yes.

\* \* \* \* \*

Q. Did you enter into possession of the property you bought? A. Yes.

Q. When did you do so? A. On the 1st day of September, 1909."

The only conclusion I can come to from the pleadings, the documents and the evidence is that Peterson bought the land in dispute from his co-plaintiff, and pursuant to that purchase he entered into possession on the 1st day of September, 1909, which is the date of the agreement to purchase put in by the defendants, and I must draw the natural inference that his only purchase was under that agreement.

The plan 472 shows St. Mary's Road to be 99 feet wide.

Mr. R. C. McPhillips, who made Plan 606, was called as a witness, and he swears, in answer to a question put to him by the plaintiffs' counsel, that this plan was prepared as a result of a survey made by him under the direction of a Dominion Order-in-Council. He says that the survey made by him shows St. Mary's Road at this point as 99 feet wide and stakes were put down showing this—so that the actual survey on the ground, of which this plan is an indication, made that road 99 feet wide.

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The plaintiff Peterson is, however, in actual possession of a strip of land  $16\frac{1}{2}$  feet wide, which, if the road is 99 feet wide, is a part of the highway, and was so in possession when the invasion thereof by the defendants took place. Peterson swears he purchased this land in question from Guay and took possession pursuant to that purchase; but it is argued that, if this parcel in dispute was not a part of the land so purchased, he cannot be deprived of possession unless it is shown to be a part of the highway.

All parties agree as to the centre line of the highway, and they agree that this line is correctly shown in plans 472 and 606; but the dispute is whether the highway is 66 feet or 99 feet wide.

The case *St. Vital v. Mager*, 19 M.R. 293, was relied on at the trial as an authority that this road is only 66 feet wide. In that case R. C. McPhillips, a land surveyor, gave evidence which came up for discussion on page 299. In this case the same Mr. McPhillips was called and, in answer to a question put to him by plaintiffs' counsel, he swore that Plan 606 is the plan referred to on that page, and that Plan 606 was prepared as a result of the survey which he made at the request of the Dominion Government, and that case decides that this highway was vested in the Province pursuant to that survey and plan. This survey was made in 1886, and the plan made from the survey is dated January 22nd, 1887, and was registered on 3rd November, 1900, as No. 606.

Although that case refers to the width of St. Mary's Road at lots 107 and 108, it decides nothing as to the width of the road at lot 106, for the very good reason that the defendant in that case claimed title through the Hudson's Bay Company, and was not in any way complicated by the plans above referred to, and, further, perhaps, St. Mary's Road was really only 66 feet wide after its junction with St. Anne's Road, so far as Mager



was concerned. A simple review of the facts might simplify matters.

The earliest owners of that portion of Lot 106 under consideration were the Girard trustees and, by the conveyance of the trustees to the plaintiff Guay of the land on both sides of the road and up to the road according to Plan 472, the trustees declared that the road at that point was 99 feet wide. If the trustees had directed that plan to be made and registered and had made conveyances pursuant to it, that would be a dedication of the land as a highway as far as they could do so. They found this plan already registered and they acted upon it and, for all we know to the contrary, may have approved of it and procured its registration. The plaintiff Guay, by taking under that plan, recognized the road to be 99 feet wide.

The plaintiffs by dealing with the land and describing the road by Plan 606, and Peterson by registering a caveat describing his land by that Plan, have declared that the road is located according to that plan; and, as the plan does not show the width of the road, it seems to me that was an approval and a recognition of the survey to represent which the plan was made, and if so the plaintiffs have declared the road there to be 99 feet wide.

Before the grievances complained of in this suit, proceedings were taken for a special survey of the line in dispute under chapter 158 of R.S.M. 1902, and a plan of the survey was duly approved of and registered as required by the Act. I have considered with great care the remarks of the learned Chief Justice of the King's Bench with reference to this survey and plan.

The learned Chief Justice treated the plan as an act of expropriation, but, with great deference, in this case I would treat it simply as evidence of the position or location of a line. The original Act authorized the survey "for the purpose of correcting any error or supposed

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error in respect of any existing survey or plan \* \* or of showing the divisions of lands," and the notice published in the Gazette pursuant to section 5 of the Act gives as a purpose of the survey the following: "for the purpose of correcting errors in prior surveys \* \* \* and for the purpose of defining and establishing the location of boundaries of property." An Order-in-Council was duly passed confirming this survey, and the plan was duly registered as No. 1871.

Mr. McPhillips, who made plan 606, also made the special survey and plan 1871, and swears he located St. Mary's Road in the last mentioned plan upon the same ground as 606, and that he laid out the road 99 feet wide.

The sole contest in this suit is as to the location of the western boundary of St. Mary's Road. All parties agree where the centre line of this road is. The first registered plan 472 places the western boundary where the defendants contend it is. The original owners of the land, so far as the evidence shows, placed the western boundary according to that plan. The plaintiff Guay, in taking title, admitted the western boundary to be as the defendants claim. The plaintiff Peterson, by his agreement to purchase and by his caveat filed two years later, admitted the western boundary to be as set forth in Plan 606, and the official survey under which this highway was vested in this Province placed this western boundary on the same line as Plan 472, and Plan 606 was made from that survey. The special survey and the plan thereof, No. 1871, simply was to settle the errors or disputes and define the boundary line, and is, to my mind, simply further evidence of the fact of the exact location of the western boundary line of the highway, the location of the centre line of which all parties admitted.

It seems to me the notice in the Gazette, published under section 5 of the Act, was sufficient to justify a survey of the boundary lines of the highway and that, by

virtue of sections 14 and 17, the plan fixes, as against the plaintiffs, the western boundary of St. Mary's Road, which was the eastern limit of their land.

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Judgment.  
HOWELL,  
C.J.M.

The documents, plans and evidence in this case establish, as against the plaintiffs, the fact that the western boundary of St. Mary's Road, at the point in dispute, is as claimed by the defendants, and I would find, as a fact, that the land in dispute now occupied by the plaintiff Peterson is a part of St. Mary's Road.

Probably the plaintiffs were led to enter into possession of the land in dispute because of the decision in the *Mager* case, thinking it established the road as to them. And the ordinary rule for this reason as to costs might well not be followed.

The appeal will be allowed without costs, and the judgment entered for the plaintiffs must be set aside and judgment entered for the defendants, without costs.

HAGGART, J.A. The land described in the statement of claim charged to have been trespassed upon by the defendants is a portion of a larger quantity acquired by the plaintiff Guay from the executors of the late Senator Girard in the year 1904. The transfer executed by the executors and the certificate issued to the plaintiff Guay describe the land by metes and bounds, and refer to the different parcels as lying to the east or west of St. Mary's and St. Anne's Roads, and also refer to these roads as shewn upon plan No. 472.

On the 1st of September, 1909, the plaintiff Guay, by an agreement in writing, sold to his co-plaintiff a portion of the above mentioned land described as 45 feet in width of Parish Lot 106, of the Parish of St. Boniface, lying to the west of the westerly limit of St. Mary's Road as shewn on plan 606 filed in the Registry Office. Both parties sign and seal the agreement of sale. The plaintiff Peterson gives notice to the public of his purchase by

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Judgment.  
HAGGART,  
J.A.

filing his caveat and describes the land as the same is described in the agreement of sale.

St. Mary's Road is shewn upon both of these plans as being 99 feet in width where it crosses Parish Lot 106.

Some months after the purchase the plaintiff Peterson fenced his lot up to within 33 feet of the centre line of St. Mary's Road, and contended that the road was only sixty-six feet in width.

The defendant Municipality proposed paving the road and let the contract for this purpose to their co-defendant. The defendants removed the fence. This action is to restrain the defendants as trespassers. The subject of the trespass is 45 feet by  $16\frac{1}{2}$  feet of land, and the question to be determined is whether the road opposite the plaintiff Peterson's land is 66 feet or 99 feet wide. Where is the western limit of St. Mary's Road? The western limit of the road is the eastern limit of the plaintiff Peterson's land.

There is no evidence that the plans in question were made by a duly authorized official or that all the formalities required by law were complied with, but it is to be observed that both plaintiffs make use of them to describe the land in dealing with it. I do not think that they should be allowed to take advantage of any defects, if any such exist. They dealt with the land in question as fronting on a 99-foot roadway.

The defendants, however, claim that, if any uncertainties as to boundaries ever existed, they have been cured by the steps taken under the provisions of The Special Survey Act, chapter 158 of the Revised Statutes of Manitoba, 1902. Section 3 of the statute, as amended by section 1 of chapter 62 of the statutes of 1912, enacts as follows:

"The Attorney General may direct a special survey \* \* \* for the purpose of correcting any error or supposed error in respect of any existing survey or plan,

or of plotting land not before sub-divided, or of showing the divisions of lands of which the divisions are not shewn on any plan of sub-division (or for the purpose of fixing the location or width of any roads or highways or for the purpose of establishing any boundary lines the positions of which, owing to the obliteration of the original monuments defining the same on the ground, have become doubtful or difficult of being ascertained) and upon every special survey to have a plan prepared shewing the same, which said special survey and plan may be made on the principle of block outline survey or a completed survey either in whole or in part."

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Judgment.  
HAGGART,  
J.A.

And then section 5 provides that the Attorney General may publish in the Manitoba Gazette a notice setting forth that the special plan has been filed and that it is to be submitted for the approval of the Lieutenant-Governor-in-Council "and also setting forth the object of the special survey" and the time fixed for the hearing by the Attorney General of complaints by persons interested.

It was objected that this notice was not sufficient and did not contain sufficient information of any intention further than to correct errors in former plans and should have intimated an intention to take the land and of establishing a new width or new boundaries of the highway. The words in the notice are "for the purpose of correcting errors in prior surveys of the above described portion of the said City and for the purpose of *defining and establishing the location of boundaries of property within the same.*"

I think the notice, though not following the exact wording of section 3, as amended, is comprehensive and wide enough to intimate the objects sought by the proceedings. The expression, "the location of boundaries," is comprehensive. The sole question is, where is the eastern limit of the plaintiffs' land? It is *coterminous* with the western boundary of St. Mary's Road, and the fixing of that line establishes the width of the road and the location of the road.

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Judgment. The Order-in-Council seems to be in due form and the  
HAGGART, notice of this Order-in-Council under section 15 is duly  
J.A. proved and the Legislature, anticipating the usual mistakes of solicitors, generously provides that such notice, when published, "shall be conclusive evidence of the Order-in-Council and of the regularity of all proceedings leading up to the passage of such Order-in-Council and of the approval of the survey and plan and, except in so far as the Order-in-Council may be set aside or varied under the provisions of this Act, such Order-in-Council shall not be set aside on any ground whatever, and such survey and plan shall be thenceforth held to be approved *and shall be final and binding upon all parties whatsoever.*"

This is not a case of confiscation, or of the vesting of one man's property in another without compensation. It is legislation prompted by the existing conditions, the obliteration of original surveyor's posts or landmarks.

Evidence which would define the property rights of adjoining land owners is lost; original monuments and landmarks have been obliterated; an expert, a surveyor, is appointed as arbiter, makes his inquiries and investigations and reports by a special plan or survey, and this report, plan or survey is the substitute for what has been lost or obliterated, and is the evidence, so to speak, upon which the Court disposes of the questions in issue. The lines, areas, measurements, then, are conclusive so far as they can be made so by statutory enactment.

It is contended that this statute confiscates the plaintiff's land or encroaches upon his rights, and that we should not construe it so as to accomplish that object unless we are obliged to so construe it.

It is, in my opinion, curative, remedial and beneficial in its purpose. It should receive a generous interpretation so as, if possible, to carry out the intention of the Legislature in making certain and defining property

rights and eliminating the source of endless litigation brought about by vague and undefined boundaries.

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Judgment.

The sole question is, where is the western limit of St. Mary's Road? The statute put in operation by the request of the Municipality, or on the initiative of the Attorney General, has determined that question.

HAGGART,  
J.A.

The finding of this expert arbiter, ratified by the Attorney General, incorporated in and promulgated by the order of the Lieutenant-Governor-in-Council as shewn upon this special plan, is a substitute for the evidence that has been lost and the landmarks that have been obliterated, and this plan shews the limits of the domain of the plaintiffs and the defendant Municipality respectively.

With all due respect for the carefully considered reasons of the learned Chief Justice of the King's Bench, I would allow the appeal.

PERDUE, J.A., and CAMERON, J.A., concurred.

*Appeal allowed.*

1913

## FOX v. REID.

Before PRENDERGAST, J.

*Vendor and purchaser—Agreement of sale of land—Cancellation of agreement—Notice of cancellation—Abandonment of purchase—Laches.*

1. A notice of cancellation of an agreement of sale after thirty days is ineffectual if the agreement provides for a month's notice.

*Le Neveu v. McQuarrie*, (1907) 21 M.R. 399, followed.

2. A purchaser under an agreement of sale of land who has made only the initial payment and is in default in his subsequent payments for over four years, has paid no taxes on the land and, upon being afterwards served with the statement of claim in an action for cancellation, writes the plaintiff a letter stating that he had been unable to make payments and offering to sign any papers required "to place you in possession," should be held to have abandoned his purchase.

*Hicks v. Laidlaw*, (1912) 22 M. R. 96, followed.

*Cornwall v. Henson*, [1900] 2 Ch. 298, distinguished.

3. The fact that the agreement provided for cancellation by notice and that such notice was not properly given does not preclude a finding of abandonment.

Judgment for a declaration that the defendant had no longer any interest in the land and an order discharging the registration of the agreement and a caveat filed by the defendant thereunder.

DECIDED: 14th April, 1913.

Statement.

ACTION for a declaration that the defendant no longer had any interest in certain lots situate in the town of Selkirk which plaintiff Fox agreed to sell to him and he agreed to purchase from Fox, by instrument under seal, and for the discharge of a caveat and vacating of certain registrations against the property.

*F. Heap* and *R. D. Stratton* for plaintiff.

*W. M. Crichton* and *E. A. Cohen* for defendant.

PRENDERGAST, J. Many admissions were made at the trial apart from those contained in the statement of defence, and the case now rests on two points: first, was the cancellation notice served by the plaintiffs on the defendant valid and effective; and second, was there abandonment by the defendant?

The agreement is dated November 2, 1906, and the con-



sideration therein is \$550, payable as follows: \$184 down, which was then paid in effect; \$183 on November 1, 1907, and \$183 on November 1, 1908, with interest at 6 per cent.

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Judgment.  
PRENDERGAST,  
J.

It provides that time is to be considered of the essence of the agreement, and contains a default and cancellation clause.

About one month after the execution of the agreement, the defendant caused the same to be registered as to such lots as were still under the Old System, and had a caveat filed with respect to those brought under the Land Titles Act.

The following spring (1907), the defendant went to live at Vancouver, B.C.

On November 8, 1907, that is to say one week after the first instalment of principal and interest became due, the plaintiff Fox issued, through the Dominion Bank, a sight draft on the defendant for the said amount, directed, as the same reads: "To J. Reid, Esq., Hotel Astor, Vancouver, B.C."—which was returned to him some time after with the words endorsed, "Out of town." Having sent out the draft a second time a few days later, it was again returned to him, this time with the words: "Have settled, return." Whether the draft was presented to the defendant this second time, and whether he wrote or caused to be written thereon the three words stated, there is nothing more than the above to show—except that a cancellation notice mailed to the defendant at the same address less than two weeks later did reach him on his own admission.

On January 3, 1908, the plaintiff Fox had the defendant served with cancellation notice. I must hold, which will dispose of the first question, that this notice is inoperative and of no effect, at all events with respect to cancellation, for several reasons and, amongst others, that it purports to give a thirty days' notice as therein stated,

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Judgment.

PRENDERGAST,  
J.

while the default and cancellation clause of the agreement requires that one month's notice be given: *LeNeveu v. McQuarrie*, 21 M.R. 399. This defect in the essential part of the notice, being that which contains the notice proper, is not cured, as urged for the plaintiff, by the fact that the default and cancellation clause as incorporated in the agreement is set out in full in the recitals which are at the beginning of the notice.

In the spring following his giving notice, the plaintiff Fox took possession of the lots by clearing them of scrub, fencing them and working them as a garden. I should here say that the defendant never actually entered into possession of the land.

In 1911, Fox sold part of the lots to George Bolton and part to Frederick Linton, his co-plaintiffs in this action. It would appear that Fox sold to those parties practically for the same price that he had sold to the defendant.

In the beginning of January, 1912, Bolton, having tried to register his transfer, found the defendant's caveat filed against the property. Fox says he did not know until then that the defendant had filed this caveat in the Winnipeg Land Titles Office, or registered his agreement in the Registry Office at Selkirk.

A few days later (January 22nd), the plaintiffs instituted this suit, but were unable to serve the defendant with the statement of claim until April 12th.

On the same day that the defendant was so served, he wrote Fox the following letter:

Vancouver, B.C.

April 12, 1912.

George H. Fox, Esq.,  
Selkirk.

Dear Sir,—I have been served with papers from Heap & Stratton, Winnipeg, in connection with some lots I bought from you some years ago and on which I was unable

to make my payments owing to some heavy financial losses I had about that time. I then received a notice of cancellation about December, 1907. When I received this notice, I thought that put an end to the whole matter. 1913  
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I cannot understand why you should go to any expense or trouble when you could have written me yourself and have me sign any papers required which would place you in possession of the property. I don't want any trouble with any one: Life is too short for that. If I could have made good at the time, you certainly would not have had to cancel me out. I thought it was hard of you at the time as you must have known my position in the losses I sustained not many miles from Selkirk. However, it is all gone and past and cannot be helped now. Forward me any papers you want me to sign that will place you in possession and I will sign and return same. I also received a letter from you on Tuesday asking about those two lots. I sold them about three months ago for what I paid for them, namely \$150, or \$300 for both. Since I sold I have had a couple enquiries. Let me know what they are worth and I will get the owner and see what he will take.

Trusting to hear from you by return mail.

(Sgd.) Jos. Reid.

Salisbury Court, Suite 19,  
Vancouver, B.C.

P.S.—Could you sell any Coquitlam lots there, if I sent you the blue prints. There is a big boom on there now.

The words of the above letter: "I also received a letter from you on Tuesday asking about those two lots," etc., refer to two lots other than those in question which the defendant had previously owned at Selkirk, and of which Fox wished to have the listing for sale.

I should here remark that this was the first communication from the defendant to Fox, ever since the former's leaving for British Columbia a few months after his purchase.

Fox apparently replied to the above letter shortly after, enclosing a blank form of withdrawal of caveat.

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On April 12th, the solicitors for Fox received from the defendant's solicitors at New Westminster, B.C., the following telegram:

"*Fox versus Reid.* Please wire at once, our expense, what amount of money necessary for defendant to remit in order to obtain deed of Selkirk lots free of all encumbrances. What amount will your client pay for quit claim?"

It does not appear that answer was made to this telegram.

Then the defendant writes to Fox this letter, dated by error May 1, 1911, which should read May 1, 1912:

"Dear Sir,—I have decided to pay over the money on those lots and have instructed my solicitors to forward the money to your solicitors in Winnipeg. Kindly have everything fixed up and get your money. I will send you a good listing of Coquitlam in a few days, one that you can make lots of money out of."

Finally, on May 9th, tender was made to Fox of the amount still due under the agreement.

I should also state that, when purchasing the property, the defendant stated that he was doing so for speculative purposes; that he never at any time paid any taxes as called for by the agreement, and that the property in the spring of 1912 had increased somewhat in value, although not much.

On the foregoing facts, I find that there was abandonment by the defendant.

I do not see that the fact that the agreement provides for cancellation by notice, and that such notice was not properly given, precludes that finding.

First, the defendant was never in actual possession, and he bought for speculative purposes. Then, he only made the cash payment, never paid taxes, and his registering the agreement and filing a caveat shortly after his purchase, of course, only show his intention at that time of adhering to the contract.

A year later, when the first payment was due, the plaintiff Fox made a draft on the defendant, which he refused; and, shortly after, cancellation notice was served on him. Of course the cancellation notice was inoperative as such. Yet, especially coupled as it was with the making of the draft, it was notice to the defendant that Fox was not acquiescing in any delay and was insisting on payment.

Whatever effect the defendant may have thought that the notice had and whether the effect which he thought that the notice had then partly determined or not the conclusion that he came to, the fact is that he then made up his mind to abandon, and that this determination persisted until after he was sued. We have his own declaration as to that in his letter of April 12, 1912, to the plaintiff Fox.

This letter, moreover, shows that, whatever effect he may have thought that the notice had, he had otherwise a very cogent and peremptory reason for giving up, and that was that during all those four years he was unable to pay. He even complains in that letter of the bringing of the action as unnecessary, saying that he is willing to abandon in writing and that the plaintiff Fox must have known that his financial difficulties did not allow him to meet his payments.

He also failed to pay taxes for four years—that is to say, not only for such a length of time that the land would be sold for taxes, but also that the two years for redemption would have elapsed, although of course he would be entitled to further notice.

In short, he made up his mind to abandon on his own admission; that he was unable to pay was in itself a sufficient reason to abandon, and he remained in that frame of mind and determination for four years, waking up only when he was sued, after Fox had resold to his

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co-plaintiffs and when the property had increased in value.

In *Cornwall v. Henson*, [1910] 2 Ch. 298, where it was held that there had not been abandonment, stress is laid in the three judgments on the fact that eleven payments out of twelve had been made. There also had been considerable delays all along to which the plaintiff had acquiesced, and the agreement moreover contained this clause: "I agree to grant a further extension on application of the purchaser at an increase of interest as shall be determined by both parties."

I am free to say that, were it not for the defendant's letter, I would not infer abandonment from the other facts alone; but in this document the defendant not only states that he has made up his mind to abandon, but sets out his inability to pay, which was the very best of reasons for abandoning.

In *Hicks v. Laidlaw*, 22 M.R. 96, which was an action for the same declaration as in this one, and also based on abandonment, both the trial Judge and the Court of Appeal, after finding that there was no abandonment, nevertheless made the declaration prayed for, on the ground that, assuming the action to have been brought by the defendant for specific performance, he could not have succeeded on account of having waived all rights to the same by delays and laches. It is true that in that case there was no provision for cancellation by notice in the agreement. That, however, is immaterial in my opinion; and, if that view is correct, there seems to me to be nothing to distinguish the one case from the other.

There will be a declaration as prayed for, and an order discharging the caveat and vacating the registration of the agreement.

## COURT OF APPEAL.

## GOLD MEDAL FURNITURE CO. V. STEPHENSON. •

Before HOWELL, C.J.M., PERDUE, CAMERON and HAGGART, J.J.A.

*Guaranty—Joint guarantors—Husband and wife—Undue influence—Liability of remaining guarantors when one declared not to be bound—Principal and agent—Warranty of authority of agent—Oral evidence to explain signature of document—Right of contribution between co-sureties—Estoppel—Construction of contract.*

When a married woman disputes her liability to a creditor of her husband upon a guaranty signed by her at his request, the onus is upon her to prove that the husband had exerted an overpowering influence upon her to induce her to sign it and that the guaranty was an immoderate and irrational act on her part.

*Nedby v. Nedby*, (1852) 5 De G. & Sm. 377, and *Bank of Montreal v. Stuart*, [1911] A.C. 137, followed.

T. S. was an officer and a shareholder in the debtor company and so interested in getting an extension of time and further credit from the plaintiffs. The only evidence as to her signing the guaranty was her own, which was to the effect that she did not remember when or where it was signed, that she had full confidence in her husband and signed anything that he wanted her to sign without asking any questions, that he had not explained to her the nature of the instrument, nor had she asked him to do so.

The plaintiffs had been pressing for payment of the overdue account and J. A. S., the president of the S. Company, offered to procure the guaranty in question, if time were allowed and further goods supplied on credit. Plaintiffs' agent agreed to this and then J. A. S. prepared a form of guaranty and submitted it to the agent. On the latter approving of the form, J. A. S. got the guaranty signed and handed it to the plaintiffs' agent. Plaintiffs afterwards gave time and supplied further goods on credit. There was not sufficient evidence to show that the S. Company was insolvent at the time, or that the parties did not expect that it would get over its difficulties in consequence of the giving of the guaranty. Plaintiffs' agent knew nothing of how the signature of T. S. had been obtained.

*Held*, (CAMERON, J.A., dissenting) that, under these circumstances, T. S. was liable on the guaranty as she had not satisfied the onus that was upon her.

If the creditor has no notice of any improper influence by the husband in obtaining the wife's signature and, in consideration of the document, has given value or changed his position, the wife will be bound by it, unless the creditor employed the husband to obtain the security and made him his agent in so doing and the husband used improper means to obtain the signature, or unless deception or fraud was used by the husband in obtaining the signature.

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*Bischoff's Trustee v. Frank*, in appeal, (1903) 89 L. T. 188, cited in *Howes v. Bishop*, [1909] 2 K. B. at p. 397; *Talbot v. von Boris*, [1911] 1 K. B. 854, and *Carlisle Company v. Bragg*, [1911] 1 K. B., per Buckley, L. J., at p. 495, followed.

*Turnbull v. Duval*, [1902] A. C. 429, and *Chaplin v. Brammall*, [1908] 1 K. B. 238, distinguished.

*Held*, also, that the evidence failed to bring the case within the principle laid down by Lord Macnaghten in *Bank of Montreal v. Stuart*, [1911] A. C. 120, namely, that, when there is evidence of overpowering influence and the transaction brought about is immoderate and irrational, proof of undue influence is complete.

*Per CAMERON, J.A.*, This case cannot be distinguished from *Chaplin v. Brammall* and *Turnbull v. Duval*, in any important particular, and the wife should not be held liable upon the instrument. It may be that a contract signed by a married woman under the duress of her husband, she being aware of its nature and the liability imposed by it, is voidable, as against a holder for value, or a party taking the security and thereby changing his position, only if such party is aware of the duress, but in this case the evidence was that the wife did not know what she had signed and it was clear that, by acts, words and acquiescence the plaintiffs had authorized the husband to secure his wife's signature to the guaranty.

When it is a case of suretyship by the wife for the benefit of her husband, if the wife signs a document at the request of her husband, and no sufficient explanation of it is given to her and the creditor has left everything concerning the obtaining of the signature to the husband, then the creditor cannot succeed in an action against the wife on the security: *Howes v. Bishop*, [1909] 2 K. B. 390; *Halsbury*, vol. XV. 1017; *Lush on Husband and Wife*, (1910) at p. 206.

The Court dismissed the appeals against the following rulings of Metcalfe, J., in the Court below:—

1. The rule of law that, when one of several joint or joint and several sureties is released, all are released, is based on the principle that the creditor must do nothing to affect prejudicially the right of contribution between the co-sureties, and does not apply to a case where it is by no act or default of the creditor, but only by the operation of the law, that the one is released; as, for example, a wife under circumstances such as were shown in *Bank of Montreal v. Stuart*, *supra*.
2. When the creditor supplied goods upon the strength of a guaranty signed by three persons and also by one of those three as attorney for a fourth, two of them representing to the creditor that there was a good and sufficient power of attorney from the fourth person to the person who signed her name, and it turned out that there was no such sufficient power of attorney, the two who made that representation will be liable to the creditor for a breach of warranty of authority on the principle laid down in *Collen v. Wright*, (1857) 8 E. & B. 647; *Firbanks v. Humphreys*, (1886) 18 Q. B. D. 60, and



*Sliver v. Bank of England*, [1902] 1 Ch. 623, and it makes no difference that the attorney did not know that the power was insufficient.

*Weeks v. Propert*, (1873) L. R. 8 C. P. 437, followed.

The document sued on was signed (in part) as follows:

"M. Stephenson

"Per Atty.

"W. Stephenson."

W. Stephenson contended that he had not signed for himself, but only as attorney for M. Stephenson his wife.

*Held*, that oral evidence was admissible to show that W. S. intended the document as executed to bind both himself and his wife, as such evidence, while explaining, in no way contradicted the writing.

*Young v. Schuler*, (1883) 11 Q. B. D. 651, followed.

The defendant J. A. S., who was the president of the debtor company, and had undertaken to get the guaranty signed so that the plaintiffs would continue to supply goods to the company, objected that, as the guaranty was not really executed by his mother M. S., he was relieved upon the principle that it was not the guaranty which he intended to sign.

*Held*, that J. A. S. was estopped from saying that his mother was not a party to the guaranty, because he had told the creditor that W. S. had a power of attorney from his mother to sign, intending that the creditor should believe the fact and act upon it, and the creditor did believe it and act upon it by supplying goods on the strength of it.

Following general words of guaranty, the document sued on contained this clause: "and in case of insolvency of the said (debtor) you may 'rank on the estate for your full claim and we jointly and severally 'agree to pay any balance.'"

*Held*, that this expression should not be construed as in any sense limiting the effect of the prior general words, or requiring the creditor to wait until the winding up of the estate by an assignee before suing for his claim.

DECIDED: 17th March, 1913.

THIS action was brought on a guaranty given by the Statement. defendants to secure to the plaintiffs the then existing and future indebtedness of the Stephenson Furniture Company, Limited, the liability on the guaranty being limited to \$2600. The guaranty purported to be signed by the defendant James Albert Stephenson, his wife Tina Stephenson and William and Margaret Stephenson, the father and mother of James Albert Stephenson.

The following judgment was given at the trial by

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turers with head offices at Toronto and a branch office at Winnipeg. The defendant James A. Stephenson was the President of the Stephenson Furniture Co., Limited, at one time carrying on business at Winnipeg. The defendants Tina Stephenson and William Stephenson were shareholders of the Company. The defendant Margaret Stephenson is the wife of William Stephenson and the mother of James A. Stephenson.

In November, 1908, the Stephenson Furniture Company was indebted to the plaintiffs for goods previously supplied. The Stephenson Company did not meet its payments to the plaintiffs satisfactorily, and Mr. Remington, the plaintiffs' representative at Winnipeg, called upon J. A. Stephenson and told him that if payments were not made more promptly his principals would not supply further goods on credit. J. A. Stephenson and Remington discussed the financial condition of the Stephenson Company. Remington says that J. A. Stephenson told him that he hoped to get money from his father to pay off the smaller creditors and get an extension of six months from his larger creditors.

J. A. Stephenson, apparently being anxious to continue business with the plaintiff Company, told Remington that he would procure a guaranty to be signed by his father, his mother and his wife, for \$2600.

In the meantime Remington refused to supply any further goods on credit and for a short time goods were supplied, as Remington says, practically cash on delivery.

Mr. Moore, an employee of the Stephenson Company, prepared a form of guaranty which he says he copied from a form then in his possession. The guaranty is as follows:—

“Winnipeg, Nov. 21-08.

Gold Medal Furniture Manufacturing Co., Limited,  
Toronto, Ontario, Canada.

In consideration of \$2600.00 being present indebtedness and your

continuing to supply goods and merchandise to The Stephenson Furniture Company, Limited, of the City of Winnipeg in the Province of Manitoba, we jointly and severally hereby guarantee payment to you of said indebtedness and such goods as are hereafter shipped. This is a continuing guaranty and security to you for goods which have been or which hereafter may be from time to time supplied to the said Stephenson Furniture Company, Limited, and in case of insolvency of the said Stephenson Company, Limited, you may rank on the estate for your full claim, and we jointly and severally agree to pay any balance.

It is hereby understood and agreed that the amount of guaranty at any time is not to exceed the sum of twenty six hundred dollars.

J. A. Stephenson.

Tina Stephenson.

M. Stephenson per Atty.

W. Stephenson.

Witness:

Miss F. Freedman.

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It appears that J. A. Stephenson took the guaranty to his wife and asked her to sign it. She has been called by the plaintiff as a witness and, on cross-examination, says that she was not in good health at the time she executed the guaranty; that she gave birth to a child about three weeks afterwards; that she did not read the document, nor was it read or explained to her, nor did she know its nature; that she did not know she was signing a guaranty or any document which might make her liable to pay money; that she signed it simply because her husband asked her to sign it, and that she had confidence in her husband and signed whatever he asked her to sign. This testimony I must accept. The husband knew of this confidence yet he neither read nor explained the document.

Mr. Moore, the manager of the Company, says that about the time the guaranty was executed William Stephenson asked him as to what he thought of the business and stated that the Gold Medal Company desired a guaranty to be signed by himself, Margaret Stephenson, J. A. Stephenson and Tina Stephenson.

The guaranty was delivered to Remington at the store of the Stephenson Company. Remington says that he did not understand the term "*Per Atty.*" He says: "On the

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occasion when I saw Mr. Stephenson '*Per Atty.*' (which I did not understand, and W. Stephenson and James A. Stephenson had gone into the back room), I went and asked him what it meant, and he said 'My father signs for my mother,' and I said: 'What with; power of attorney?' and he said 'Yes, he has a power of attorney,' and I was satisfied with that, and I closed it up and put it in my pocket."

The plaintiffs accepted the guaranty and thereafter supplied goods to the Stephenson Company.

In April, 1909, the Stephenson Company made an assignment for the benefit of creditors. In November, 1910, a dividend of \$181 was paid by the assignee to the plaintiffs on this account.

For the purpose of this action, it was admitted at the trial that there is an existing indebtedness from the Stephenson Company to the plaintiffs, which, if the guaranty is binding, is covered thereby, but the amount of the indebtedness is not admitted.

The defendants now move for a nonsuit upon various grounds.

The defendants all claim that, the Company having become involved, they are liable only for such ultimate balance as there may be after the final dividend from the assignee, and that this action is premature.

Counsel for Margaret Stephenson contends that her husband William Stephenson exceeded his authority in attempting to execute the guaranty for her, and that she is not bound thereby.

Counsel for William Stephenson contends that the signature upon the face of it is sufficient in form to bind his wife Margaret Stephenson only and that there is no signature binding upon him.

Counsel for Tina Stephenson urges that she ought not to be bound because her signature to the document was obtained by undue influence exercised by her husband.

All the defendants contend that, if any guarantor escapes liability, all are released.

The words which it is said limit what would otherwise be unqualified liability are, "in case of insolvency of the said Stephenson Furniture Company, Limited, you may rank on the estate for your full claim and we jointly and severally agree to pay any balance." I construe these words as used merely for the purpose of making it clear that the creditors might, in case of insolvency of the debtor, rank on the estate without affecting their right under the guaranty. I cannot read them as in any sense limiting the effect of the prior general words.

As to Margaret Stephenson, I think there can be no doubt. The powers of attorney put in evidence do not authorize the execution of any such guaranty and there is no other sufficient evidence to establish authority.

As to William Stephenson, I was at first in some doubt. The signature is in the form one might reasonably use when intending to bind Margaret Stephenson only. However, if not inconsistent with the written document, a contrary intention may be shown. The words "M. Stephenson, *Per Atty.*" are sufficient to bind Margaret Stephenson and "W. Stephenson" may have been placed to the document as the signature of that defendant. Let us see what was the intention. Moore says that W. Stephenson mentioned to him the name of the proposed parties to the guaranty. There does not appear to be any doubt that he then contemplated executing such a document, not only on his wife's behalf but also for himself. In his examination for discovery William Stephenson, referring to the guaranty, says:

Q. And you signed for yourself and for your wife, did you? A. Yes.

Considering the circumstances and the evidence of William Stephenson, I can come to no other conclusion than that he intended the document as executed to bind

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both his wife and himself. Such evidence, while explaining, in no way contradicts the written document, and is admissible. I am of the opinion, therefore, that he signed it in both capacities: *Young v. Schuler*, 11 Q.B.D. 651.

The law as to the liability of Tina Stephenson is somewhat involved.

The first case to which I will refer is *Huguenin v. Baseley*, 14 Ves. 273, decided in 1807, which establishes the rule that, where a relation is constituted between two persons such that one of them has obtained an ascendancy over the mind of the other, and the latter is accustomed to rely and act upon his advice, the former is not entitled to use the influence so obtained to his own advantage, and, if he does so use it, the contract or transaction so entered into may be rescinded or avoided by the other party.

The next case to which I shall refer is *Nedby v. Nedby*, 5 De G. & Sm. 377, decided in 1852. A married woman, having power to dispose of her property, in 1821 transferred her property to her husband in consideration of natural love and affection. They continued to live together until 1836 when Mr. Nedby deserted his wife and thereupon Mrs. Nedby filed a bill alleging: (1) That she never executed the alleged transfer, or (2) that, if she did execute it, she did so in ignorance of its contents and purport and without professional advice or assistance, and upon the faith of a representation made to her by Mr. Nedby, under whose influence she was; that she was deceived and imposed upon; and that such indenture ought to be held fraudulent and void as against her.

Mrs. Nedby died before trial, and the only evidence to support her contention appears to have been an affidavit, admitted at the trial, of one of the attesting witnesses to the execution of the deed, that at the time of execution she was agitated and distressed, and that she signed it in a reluctant manner and with a dash of the pen. On the

plaintiff's behalf it was urged that the rule in *Huguenin v. Baseley* applied. Sir James Parker, V.C., says:

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"The Master has made his report, finding that Mrs. Nedby executed the deed, stating some facts, though they are not material, with respect to the circumstances under which she executed it. This raises the question on which side the burthen of proof lies. Is the appointment to be invalid unless the husband proves that the circumstances were such that the appointment ought to be supported, or is the appointment to be considered valid unless the wife shows that it was executed under circumstances sufficient to invalidate it.' An answer in the affirmative of the second of these questions is the correct view of the case; and I am of opinion that the *onus probandi* lies on the party who impugns the instrument. \* \* \*

"Upon all the principles of this Court the appointment is good, unless the plaintiffs claiming adversely to it shall show sufficient reasons to the contrary. This is the principle plainly to be deduced from the observations of the Court in *Grigby v. Cox*, 1 Ves. Sen. 517, although, as was said in that case, 'the Court will have more jealousy over such a transaction.' "

"What, then, were the circumstances in this case? The Master had found in substance that the deed was prepared by the husband's solicitor, and was executed by the wife in the presence of two of the clerks of the solicitor, and that it was not read over to her. These are circumstances which constantly occur in ordinary transactions; and it would be dangerous to say that the deed could not be supported on such grounds. The only other circumstance upon which I am asked to set aside this deed is that Williams, one of the witnesses attesting Mrs. Nedby's execution of the deed, has deposed that she was agitated and distressed, and signed it in a reluctant manner. It is impossible to act upon this evidence as a ground for setting aside the deed. The decision of the Court, in such a case as this, should not rest on speculation. There is no ground for setting aside the deed, though it is impossible not to see that there are circumstances of suspicion in the case."

*Turnbull v. Duval*, [1902] A.C. 429, was an action to set aside a deed made by a wife to creditors of her husband,

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and for a return of moneys which they had received thereunder. The question raised on appeal was whether under the circumstances a security given to the appellants by a married woman for the debts of her husband was impeachable by her. The husband did business in Jamaica. One Campbell was the creditor's agent in Jamaica. When the security was given the husband owed the plaintiffs' London firm a small account, their New York firm a larger account and the Jamaica firm nearly £1,000. The Jamaica indebtedness was mainly due for beer supplied by Campbell for Turnbull & Co. to Duval. Throughout the summer of 1898, Campbell had been pressing Duval to reduce his indebtedness and had threatened unless he did so to stop the supply. The security in question was given in August, 1898. Mrs. Duval was a good business woman. She was on good terms with her husband and trusted him but they were not living together in August, 1898. Campbell was not a stranger to Mrs. Duval. He was an executor and trustee of her father's will and presumably, therefore, a friend of the father. Mrs. Duval was entitled to a share of her father's residuary estate and Campbell was a trustee of that share for her.

Duval suggested security on his wife's property, and it was ultimately arranged that Campbell should have a security prepared and that Duval would get his wife to sign it. Campbell instructed his solicitors, who prepared the security. He gave it to Duval. Campbell's chief clerk attended with Duval and witnessed her signature. Mrs. Duval contended that she had not authorized her husband to offer her property as security. She says that shortly before August 5, 1898, she and her husband talked about her giving security. She admits that she knew he was in difficulties about the beer business, and believed that £1,000 would get him out of his trouble. She knew nothing about any document she was to sign



until it was brought to her by her husband. She had no advice about it; she did not read it; nor was it explained to her. She signed it because her husband pressed her to do so and told her he was being pressed by Campbell, and because she believed that if she did sign it for £1,000 it would enable her husband to settle the beer contract. She says that Campbell's chief clerk told her there was no harm in it, and that she attached importance to this statement, as she knew he was Campbell's chief clerk, and she relied on Campbell for protection. The security was by no means a simple document. It gave a charge on her father's residuary estate for all sums due or to become due from her husband on the three accounts already mentioned.

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The judgment of their Lordships of the Privy Council was delivered by Lord Lindley, who, at page 434 of the report, says:

"In the face of such evidence, their Lordships are of opinion that it is quite impossible to uphold the security given by Mrs. Duval. It is open to the double objection of having been obtained by a trustee from his *cestui que trust* by pressure through her husband and without independent advice, and of having been obtained by a husband from his wife by pressure and concealment of material facts. Whether the security could be upheld if the only ground for impeaching it was that Mrs. Duval had no independent advice has not really to be determined. Their Lordships are not prepared to say it could not. But there is an additional and even stronger ground for impeaching it. It is, in their Lordships' opinion, quite clear that Mrs. Duval was pressed by her husband to sign, and did sign, the document, which was very different from what she supposed it to be, and a document of the true nature of which she had no conception. It is impossible to hold that Campbell or Turnbull & Co. are unaffected by such pressure and ignorance. They left everything to Duval, and must abide the consequences.

"Their Lordships do not think it necessary to refer to authorities to show that such a transaction cannot stand.

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The well-known case of *Bridgman v. Green*, 2 Ves. Sen. 627, is conclusive to show that Turnbull & Co. can obtain no benefit from it."

*Chaplin v. Brammall*, [1908] 1 K.B. 233, is another case of an action upon a guaranty signed by a wife for the debt of her husband. The document in that case was short in form and not complicated in terms. In 1904, the defendant's husband, who was then starting business as a wine and spirit merchant, applied to the plaintiffs, who were dealers in wines and spirits, to supply him from time to time with stock on credit. The husband stated that his wife had separate property and the plaintiffs wrote to the defendant's husband enclosing the formal guaranty for her signature. The defendant signed the guaranty. At the trial the defendant gave evidence saying that she signed the paper at home one day; that she was just going out at the time, and her husband called her back and said that he wanted her to sign something; and that she did not read it, nor was it read over to her, before she signed it. She further stated that she did not know that what she signed was anything important, or that it was a guaranty.

The trial Judge came to the conclusion that the defendant was not sufficiently informed of the contents of the document, which she signed, and did not understand it.

Vaughan Williams, L.J., in delivering the judgment of the Court of Appeal, says:

"Those who, as representing the plaintiffs, prepared and sent to the defendant's husband the document sued upon, in order that he might procure his wife's signature to it, so that the plaintiffs might have security in respect of the business transactions into which they were about to enter with him, were, when they did so, clearly cognizant of the fact that the influence of a husband was being employed to obtain the signature of his wife to that document. That being so, I am sorry for the plaintiffs that they turn out not to be in a position to prove

that any proper explanation of the instrument which she was about to sign was given to the defendant before she signed it."

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"It is unfortunate that the plaintiffs did not take care to see that the defendant had independent advice in the matter. But the result is that the plaintiffs, who through their agents were undoubtedly aware that the execution of this guaranty was to be procured through the guarantor's husband, who was living with his wife at the time, and would reasonably have the influence of a husband over her, fail to show that the document was properly explained to her. Under those circumstances the case appears to me to fall within the decision of *Bischoff's Trustee v. Frank*, 89 L.T. 188."

The Supreme Court of Canada, in *Cox v. Adams*, 35 S.C.R. 393, and later in *Bank of Montreal v. Stuart*, 41 S.C.R. 516, held that the rule in *Huguenin v. Baseley* applied to transactions between husband and wife. In the latter case Anglin, J., at page 540, of the report, referring to *Bischoff's Trustee v. Frank*, 89 L.T. 188, says:

"But in that case also Mr. Justice Wright found that the defendant, whom he held liable, did not sufficiently understand the nature of the guaranty which she had signed."

But *Bischoff's Trustee v. Frank* was reversed on the facts by the Court of Appeal, whose decision is unreported. See 78 L.J.K.B. 800. See *Howes v. Bishop*, [1909] 2 K.B. 394, 397, 401.

While the appeal to the Privy Council in *Bank of Montreal v. Stuart*, [1911] A.C. 137, was dismissed, their Lordships of the Privy Council expressed a different view as to the necessity for independent advice, and have accepted without question the doctrine laid down in *Nedby v. Nedby*.

Lord McNaghten, in delivering judgment, said:

"Their Lordships accept the law as laid down by Parker, V.C., in *Nedby v. Nedby* to the effect that 'in

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the case of husband and wife the burden of proving undue influence lies upon those who allege it.”

“It is difficult to determine in any case the point at which the influence of one mind upon another amounts to undue influence. It is specially so in the case of husband and wife, for, as Lord Cranworth observed, ‘The relation constituted by marriage is of a nature which makes it as difficult to inquire as it would be impolitic to permit inquiry into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish.’ *Boyse v. Rossborough*, 6 H.L.Cas. 48.”

“It may well be argued that, when there is evidence of overpowering influence and the transaction brought about is immoderate and irrational as it was in the present case, proof of undue influence is complete.”

Their Lordships of the Privy Council decided *Bank of Montreal v. Stuart* upon the particular facts of that case.

I think, after a careful consideration of the authorities, that the onus is on the defendant Tina Stephenson to establish:

- (1) Overpowering influence;
- (2) An immoderate and irrational act.

If, upon the facts, it appears that a wife, without questioning her husband, signs any and all such documents brought to her by her husband, without any knowledge of their contents, of their nature or their purport, then I think that overpowering influence is established. If, without knowledge of the transaction, its nature or its purport, she executes a document which transfers a large portion of her property, and if that act is not of material benefit to either herself or her husband, then I think she does an immoderate and irrational act and, if she establishes on the inquiry facts from which these inferences must arise, then I think she has proven undue influence.

In the present case, however, the debt was not a debt

of the husband. It was a debt of a joint stock company in which she appears to have been a stockholder; but, in so far as she was concerned, the extent of her interest in the Company was not known to her own mind, but was in the mind only of the husband. The husband was the president and apparently the general manager of the concern. It was on its last legs. The husband and the creditors knew this. But the husband, apparently having some, to my mind altogether unfounded, hope that he could weather the storm, and apparently dreading the insolvency of the concern with which he himself was so closely identified, procures the signature of his wife to the guaranty of the indebtedness of that concern.

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I think that under such circumstances, if the wife proves undue influence, she is not liable. Here the creditor, on the verge of insolvency of the debtor, arranged with the husband to procure the guaranty. He does procure the guaranty. The wife signs it, knowing nothing of its purport, of its nature or of her liability thereunder, simply because her husband asked her to sign it as she says she had signed other documents, and as she says she would have signed any document produced to her by her husband.

It may be said that these facts resemble closely those of *Nedby v. Nedby*; but, upon careful consideration of that case, it appears clear that the wife did not show that she was unaware of the nature of the document executed. It is true it was not read over to her at the time of execution, but there was no evidence to show that she did not know its purpose or its nature. In fact, the evidence that she appeared reluctant to sign it gives rise rather to the suspicion that she knew its nature, and I think there is a clear distinction between the facts here and the facts in *Nedby v. Nedby*.

The creditor left everything to the husband. Under the circumstances of this case, I do not think he stands

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in any better position than if the transaction were between husband and wife. I therefore think that Tina Stephenson is not liable on the guaranty.

The plaintiffs contend that William Stephenson and J. A. Stephenson, if not otherwise bound, are liable for breach of warranty of authority. It seems clear that a representation of authority was made by the father by signing, and by the son in express terms, that the father was authorized to sign the guaranty on behalf of Margaret Stephenson. Although it is shown that the father was in the office about that time, it is not shown that he heard the statement made by his son to Remington.

In *Collen v. Wright*, 7 E. & B. 301; 8 E. & B. 647, the rule is established that a person who enters into a contract expressly as agent for a 'principal named impliedly warrants his authority, and if he has in fact no such authority he may be sued under the implied contract and is bound to make good to the other contracting party what that party has lost or failed to obtain by reason of the non-existence of the authority. Wills, J., says:

"I am of the opinion that a person who induces others to contract with him as the agent of a third party, by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages he sustains by means of the assertion of authority being untrue. \* \* The fact that the professed agent honestly thinks that he has authority affects the moral character of his act, but his moral innocence, in so far as the person he has induced to contract is concerned, in no way aids him. \* \* \* The obligation arising in such a case is well expressed by saying that the person professing to contract for another impliedly undertakes with the person who enters into such contract on the faith of his being duly authorized that the authority he professes to have does in fact exist."

In dealing with *Collen v. Wright*, Lord Esher, in *Firbanks v. Humphreys*, 18 Q.B.D. at p. 60, says:

"The rule to be deduced is that where a person, by asserting that he has the authority of the principal, induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertakes that it is true and he is liable personally for the damage that has occurred."

And further, at p. 62: "The fact that the directors were themselves deceived and did not know or suspect that they had not the power to do what they did is immaterial in cases of this description."

The law is fully reviewed in *Oliver v. Bank of England*, [1902] 1 Ch. D. 610. At p. 623 of the report, Vaughan Williams, L.J., says:

"I think the language used in *Weeks v. Propert*, L.R. 8 C.P. 437, and *Dickson v. Reuters Co.*, 3 C.P.D. 1, shows that the principal of *Collen v. Wright* extends further than the case of one person inducing another to enter into a contract. The rule to be deduced is that, where a person by asserting that he has the authority of the principal induces another to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue to the injury of the person to whom it is made, it must be taken that the person making it undertakes that it was true and he is liable personally for the damage that has occurred."

In the case of *Starkey v. Bank of England*, [1903] A.C.114, Lord Lindley, at p. 120, says:

"Whatever may be said of other cases, *Collen v. Wright* is sound, *Firbanks v. Humphreys* is sound and so is this decision."

The rule is expressed in *Halsbury*, vol. 1, par. 466, as follows:

"Where any person purports to do any act or make any contract as agent on behalf of a principal, he is deemed to warrant that he has in fact authority from such principal to do the act or make the contract in question. If, therefore, he has no such authority he is

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liable to be sued for breach of warranty of authority by any third person who was induced by his conduct in purporting to act as agent to believe that he has authority to do the act or make the contract and who by acting upon such belief has suffered loss in consequence of the absence of authority. The agent's belief in the existence of his authority is immaterial. But he is not liable if, at the time of doing the act or making the contract, he expressly disclaims any present authority or if the other party knows that he has no authority or is fully acquainted with the facts from which the inference of authority is drawn."

It was strongly urged in this case that William Stephenson had in fact a power of attorney, and that, while the document itself might not be sufficient to authorize the execution of the guaranty, the representation made was one of law and not of fact, and that there was no liability for breach of warranty: *Rashdale v. Ford*, L.R. 2 Eq. 750.

I think, however, that here the representation of authority is a representation of fact.

If the facts are equally within the knowledge of the parties, or if the representation is not relied upon, the agent may of course escape liability, but here the power of attorney was in the possession of the agent and was not produced and I think the plaintiff comes within the rule of *Collen v. Wright*. It may be that, had the defendant said "I am executing this document under a power of attorney and here it is," and if the plaintiffs had taken the guaranty without the trouble of reading the power of attorney or informing themselves as to its effect, the agent would not have been liable.

In *Weeks v. Propert*, L.R. 8 C.P. 437, Honyman, J., referring to the remarks of Lord Justice Mellish in *Beattie v. Lord Ebury*, L.R. 7 Ch. 777, says:

"It is not necessary that the want of authority should even be known to the supposed agent. What he means is that, if one says, 'I am authorized by warrant of at-



torney to act for A.B. and here it is,' and it should turn out that the instrument contains no such authority, in that case the rule does not apply."

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However, in the present case there is no suggestion that the power of attorney was produced at the time of signature.

The defendants William Stephenson and J. A. Stephenson contend that if Tina Stephenson is not liable they are released because of their loss of the right of contribution. It is true that the co-sureties are not named in the guaranty and it also appears that Tina Stephenson had no knowledge of the nature of the transaction, but I think it is plainly evident that the creditor and J. A. Stephenson and William Stephenson and the other defendant Margaret Stephenson, through her agent, William Stephenson, intended that the four parties should be liable as joint and several co-sureties, and, applying the equitable doctrines upon which the right of contribution is based, I think the intention of the parties may be looked at to ascertain whether the right of contribution exists or not: *Evans v. Bremridge*, 2 K. & J. 185.

It is well settled that, if a creditor actually release a joint and several co-surety, or so deal with the principal debtor or a joint and several co-surety, as to deprive the surety of his right of contribution, or fail to discharge a duty to the surety and the surety's right of contribution is lost, the surety is discharged.

In *Cheetham v. Ward*, 1 B. & P. 630, a creditor had appointed one of his joint and several obligors as executor. By statute, 20 Ed. IV, c. 17, it is provided that, when the obligee made his obligor his executor, the latter was thereby discharged from any action on the bond. In an action upon the bond it was contended by the obligor that his co-surety having been appointed executor was

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released and that a release of one co-surety operated as a release of the other. Eyre, C.J., says:

"The very point in issue was, however, decided in the Year Book and Bryan there gives a satisfactory reason for the decision. In fact there is but one duty extending to joint obligors and it was therefore pointedly put that his discharge of one, or of satisfaction made by one, is the discharge of both. \* \* \* This case therefore must be decided by the Year Book and the principle there laid down, which has never been doubted since, whether founded in reason or not." Heath, J., says, "I am of the same opinion. It is of no consequence whether the release be by operation of law or by deed demonstrating the intent of the party."

In *Mayhew v. Cricket*, 2 Swans. 185, it was decided that, where a creditor had entered up judgment and taken the goods of the debtor and without the knowledge of the surety had withdrawn the execution, he had thereby discharged the surety. Lord Eldon, at p. 192, says,

"When one surety has been discharged, the co-surety is entitled to say to the creditor asserting a claim against him, 'You have discharged a surety from whom I might have compelled contribution, either in my own name in equity or in your own name at law.'"

In *Nicholson v. Revel*, 4 Ad. & E. 675, J. Revel, the elder, was indebted to the plaintiff and, after various transactions, he and Samuel Revel and J. Revel, the younger, gave their joint and several promissory notes to secure that indebtedness. Afterwards Samuel Revel paid the plaintiff £100, who accepted the same in discharge of his liability. In an action against John Revel, the younger, he contended that he was released. Lord Denman, C.J., at p. 682, says:

"We give our judgment really on the principle laid down in *Cheetham v. Ward*, as sanctioned by unquestionable authority, that the debtee's discharge of one joint and several debtor is the discharge of all."

In *Webb v. Hewitt*, 3 K. & J. 438, it was decided that, while a creditor, upon giving time to a principal debtor,

might reserve his rights against the surety, and this without communicating the arrangement to the surety, if he gave a release to the debtor he could not reserve any right against the surety because the debt was gone at law.

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In *Holme v. Brunskill*, 3 Q.B.D. 495, the defendant gave a bond for the re-delivery by the tenant of a farm and flock of sheep. Afterwards the tenant surrendered a portion of the land and, on subsequently giving up the farm, it was found that the flock had deteriorated. The surety had not been asked to assent to a new arrangement made at the time of a surrender of a portion of the demised premises. In an action on the bond it was held that the surety ought to have been asked to assent and, not having been asked, he was thereby discharged. The trial Judge having left it to the jury to decide if the new arrangement had made any substantial or material difference, it was held that that question ought not to have been left to the jury, as the surety was the sole judge whether it was reasonable he should remain liable notwithstanding the agreement.

In *Ward v. National Bank of New Zealand*, 8 A.C. 755, while it was held that, where two or more sureties contract severally, the creditor does not break the contract with one by releasing the other, yet if several persons are indebted and one makes the payment the creditor is bound in conscience if not by contract to give the party paying the debt all his remedies against the debtor. It would be against equity for the creditor to accept or receive payment from one and to permit or by his conduct to cause the other debtors to be exempt from payment.

In *Mercantile Bank of Sydney v. Taylor*, [1893] A.C. 317, the defendant Taylor was one of five joint and several sureties to the Bank. The Bank sued Taylor, who contended that the Bank had released Griffin one of the

1913 defendant's co-sureties. The Bank replied that it was a  
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METCALFE, and remedies of the Bank against the respondent and  
J. the other co-sureties were to be reserved and that such  
rights and remedies were not to be prejudiced or affected.  
Parol evidence was admitted at the trial to prove the  
replication and, judgment being entered for the plaintiff,  
upon final appeal, it was unanimously held by their  
Lordships of the Privy Council that such evidence was  
not admissible. It was evidently conceded that the dis-  
charge of Griffin released the other co-sureties.

In the case of *Ellesmere Brewery Co. v. Cooper*,  
[1896] 1 Q.B. 75, the plaintiff company, having ap-  
pointed Cooper as their travelling agent, required him to  
give security for the faithful discharge by him of his  
duties. He accordingly procured the other defendants,  
Emberton, Paye, Bromfield and Nudderley, to become  
sureties for him jointly and severally in the sum of £150,  
Paye and Bromfield for £25 each and Emberton and  
Nudderley for £50 each. After Cooper, Emberton, Paye  
and Bromfield had executed the bond it was taken to  
Nudderley, who executed it, but, when so doing, added to  
his signature the words "£25 only." The plaintiff's  
manager, who witnessed all the defendant's signatures,  
accepted the bond so executed without protest. In an  
action on the bond it was held that none of the co-sureties  
were liable. Lord Russell of Killowen, C.J., says:

"The witness to the execution of each of the signa-  
tures was one Bruce, the plaintiff's manager, who, so  
far as appears, took the bond without making any  
objection to the manner of Nudderley's execution, nor  
was it suggested that Nudderley had surreptitiously  
added the qualification of "£25" to his signature. As no  
evidence was given on the point it cannot be affirmed  
that Nudderley in bad faith sought by the form of his  
execution of the bond to limit any liability he had pre-  
viously agreed to undertake. \* \* I think the effect  
of Nudderley's mode of execution on the facts of this

case is substantially the same as if the proviso in the body of the bond had been altered by him. \* \* \* It was, therefore, an alteration. \* \* \* The result, therefore, is that neither Emberton, Paye nor Bromfield can be made liable on this bond. Each of them is entitled to say, 'The contract into which I entered was on the basis of Nudderley being a party to it with a liability of £50. That is not the contract as it now appears from the bond and I am, therefore, not bound by it.' Their position would be still stronger if Nudderley is not bound by the bond at all. \* \* \* I think he is not. He, in good faith, expressly limits his liability to £25, but he undertakes that liability, not as a separate or independent liability, but as part of a contract in which three other sureties are joining him against whom in certain eventualities he will have rights of recourse, between whom and himself a common burden is to be borne although unequally distributed. But, if in fact such sureties are not bound by the contract, and we have adjudged that they are not, Nudderley is entitled to say, 'This is not the contract into which I have entered and I am not bound by it.'"

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In the case of *Re Wolmershausen*, 62 L.T. 541, it has held that, apart from the law of principal and surety, a release to one of several persons jointly or jointly and severally liable is a release to all; but, where the alleged release is informal and not under seal, it is a question of fact to be determined from all the circumstances of the case whether a general release was intended to be given; and it is suggested that the principle of *Wulff v. Jay*, L.R. 7 Q.B. 756, ought to be followed in the case of principal and surety, and that except in the case of an actual release the surety would be discharged *pro tanto* only.

In *Polak v. Everett*, 1 Q.B.D. 669, it was held that the surety was discharged by reason of the subsequent release to the principal debtor of certain book debts due without the consent of the surety. In discussing the principle, Blackburn, J., at p. 674, says:

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"The creditor has no right, it is against the faith of his contract, to give time to the principal even though manifestly for the benefit of the surety, without the consent of the surety, the principle being, as I understand it, that, as it is very undesirable that there should be any dispute or controversy about whether it is for his benefit or not, there shall be the broad principle that, if the creditor does intentionally violate any rights the surety had when he entered into the suretyship, even though the damage be nominal only, he shall forfeit the whole remedy. Whether that was a good or just principle originally is a matter which it is far too late to think about now. I must own I have had considerable doubts about the justice of that principle; but from the time of *Rees v. Berrington*, 2 Ves. 540, it has been undisputed law, and nothing but the Legislature can interfere to alter it."

In the case of an actual and formal release, where no reservation is expressed, it is assumed that no reservation was intended, and such release must fall within those cases which deal with the wilful interference of creditors. But are the co-sureties released where one is not liable by reason of the operation of the law?

The observations in *Cheetham v. Ward* would appear to go almost that far, but upon a closer examination of the equitable principles upon which the right of contribution is based, and upon consideration of the fact that the appointment of one of the joint obligors was a wilful act of interference on the part of the creditor, I am inclined to think that I am not bound to give it that effect.

In the *Ellesmere* case the creditor took the bond fully aware of the alteration and did not discharge his duty either to Nudderley, or to the other obligors, by notifying them of such alteration.

Unless in this case there was a duty cast upon the plaintiffs of securing the execution of the guaranty by all the co-sureties so as to render them liable in law, I do not think I should find that the co-sureties are released

by reason of the non-liability of the defendant Tina Stephenson. After the most careful consideration I cannot find on the facts of this case that any such duty was cast upon the plaintiffs, and I think that the defendant William Stephenson is liable as a surety on the guaranty.

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But it is objected by J. A. Stephenson that, as the guaranty was not executed by his mother, he is relieved upon the principle that it is not the guaranty which he intended to sign. On the facts of the case I have no doubt that J. A. Stephenson was exceedingly anxious that the plaintiffs should continue to supply the Company with goods. He offered to get the guaranty. He knew that if he got it the plaintiffs would not only give time, but supply further goods. The plaintiffs gave time and did supply further goods. He undertook to procure the execution of the four parties to the guaranty. He thought his father had power of attorney to execute the document for his mother. He procured such signature. When Remington asked him what it meant, he told Remington that his father had power of attorney to sign for his mother. He told him that, intending that Remington should believe the fact and should act upon it. Remington appears to have believed the fact and to have acted upon it. I think that under all the circumstances J. A. Stephenson cannot now be heard to say that his mother is not a party to the guaranty and that thereby he is released. I think he is liable as a surety.

I would, therefore, allow the motion for nonsuit as to Tina Stephenson and as to Margaret Stephenson with costs, and refuse the non-suit as to William Stephenson and J. A. Stephenson.

The plaintiffs entered an appeal against the foregoing judgment, but when the same came on for argument before the Court of Appeal, that Court declined to hear the same until there had been a judgment given with regard to the defendants William Stephenson and J. A.

1913      Stephenson. The matter was, therefore, referred back to  
Judgment. Metcalfe, J.

METCALFE, J.      16th October, 1912. On the matter coming on again  
this day for further hearing, the following judgment was  
delivered by

METCALFE, J. The defendants having moved for a  
nonsuit, and judgment being reserved, I subsequently  
gave judgment allowing the nonsuit as to Tina Stephen-  
son and Margaret Stephenson, and refused the nonsuit as  
to William Stephenson and J. A. Stephenson.

Subsequently the case coming on again for hearing,  
counsel for both defendants stated that he offered no  
evidence.

I see no reason to change my opinion as expressed in  
my reasons for judgment on the motion for nonsuit.

The parties having agreed that if there were liability  
the amount should be ascertained by reference, there will  
be a reference to the Master to ascertain the amount  
owing.

Counsel for Margaret Stephenson and Tina Stephen-  
son has applied for leave to tax full costs. I refuse to  
make such order.

The plaintiffs appealed against the judgment granting  
a non-suit in favor of Margaret Stephenson and Tina  
Stephenson.

The defendants William Stephenson and J. A. Stephen-  
son also appealed against the judgment in so far as it  
was adverse to them.

*D. H. Laird* and *F. J. G. McArthur* for plaintiffs,  
appellants, cited *Barron v. Willis*, [1899] 2 Ch. 578,  
[1909] 2 Ch. 121; *Howes v. Bishop*, [1909] 2 K.B.  
390; *Bank of Montreal v. Stuart*, [1911] A.C. 120;  
*Nedby v. Nedby*, 5 De G. & S. 377; *Wallis v. Andrews*,  
16 Gr. 624, 637; *McEwan v. Milne*, 5 O.R. 100; *Turn-  
bull v. Duval*, [1902] A.C. 429; *Chaplin v. Brammall*,



[1908] 1 K.B. 233; *Lewis v. Campbell*, 21 M.R. 390; *Cobbett v. Brock*; 20 Beav. 524; *Rhodes v. Bate*, L.R. 1 Ch. 252; *Talbot v. Von Boris*, [1911] 1 K.B. 854; *Bainbrigge v. Browne*, 18 Ch. D. 188; *Scholefield v. Templer*, 4 De G. & J. 429; *Hannah v. Graham*, 17 M.R. 532; *Hunter v. Walters*, L.R. 7 Ch. 75; *King v. Smith*, [1900] 2 Ch. 425; *Re Wolmerschausen*, 62 L.T. 541, and 15 Halsbury, 527-529, 569, 570.

*C. P. Fullerton, K.C.*, and *H. R. L. Henry* for defendants *Margaret Stephenson* and *Tina Stephenson*, respondents, cited *Chaplin v. Brammall*, [1908] 1 K.B. 239, *Turnbull v. Duval*, [1902] A.C. 429; *Howes v. Bishop*, [1909] 2 K.B. 390; *Bank of Montreal v. Stuart*, 41 S.C.R. 533, 540; *Euclid v. Hobs*, 23 O.L.R. 377; 15 Halsbury, 541; *Talbot v. Von Boris*, [1911] 1 K.B. 854; *Canada Furniture Co. v. Stephenson*, 19 M.R. 618, 627, and *Trimble v. Hill*, 5 A.C. 342.

*P. M. Burbidge* for defendants *William Stephenson* and *A. Stephenson*, appellants, cited *Bank of Montreal v. Stuart*, (*supra*); *Rashdall v. Ford*, 35 L.J.Ch. 769; *Maneer v. Sanford*, 15 M.R. 181; *Beattie v. Lord Ebury*, L.R. 7 Ch. 777; *Eaglesfield v. Londonderry*, 4 Ch. D. 693, and *Ellesmere v. Cooper*, [1896] 1 Q.B. 75.

HOWELL, C.J.M. I do not think that the judgment of Mr. Justice Metcalfe in this case should be disturbed, except as to the defendant *Tina Stephenson*. The learned Judge, in a careful and well considered judgment, has referred to the recent cases very fully. There is really no contradictory evidence to be considered, and the inferences to be drawn from the undisputed testimony are as open to this Court as to the trial Judge.

The *Stephenson Furniture Company, Limited* (which I shall hereafter refer to as the Company), I infer from the evidence, was a close corporation having as shareholders practically only the individual defendants, and apparently the family gave the name to the Company.

1913 \* Tina Stephenson's statement of defence shows that she  
Judgment. was secretary of the Company, of which her husband, the  
HOWELL, defendant J. A. Stephenson, was president and manager,  
C.J.M. and, from statements of counsel at the trial and her own  
vague evidence on the subject, I infer she was a share-  
holder to a considerable extent.

The Company owed the plaintiffs about \$2600, and the latter refused to give any more credit, and were pressing for payment, when the president offered to give the security which is now impeached, which offer was accepted. There was delay in the matter and the plaintiffs pressed the president to carry out his promise. Accordingly the president instructed Mr. Moore, one of the employees of the Company, to draw up, and he did draw up, the written document, the subject matter of this suit, which is set out in full in the judgment of the trial Judge.

The defendant J. A. Stephenson took this document to Mr. Remington, the plaintiffs' agent in Winnipeg, and asked him if that form would do and, after reading it over, the agent said it was all right. At that time the amount, \$2600, had not been filled in at the beginning and the end of the document. It was apparently filled up later, but before signature. The agent then knew that the defendant J. A. Stephenson was about to procure the signature of his wife, Tina Stephenson, as well as the other defendants, to this document. The only evidence as to the execution of the document by her is her own evidence—she having been called by the plaintiff. She admits her signature to the document, but will not tell us anything more about it. She says her husband must have asked her to sign it, but she does not remember when or where or what took place, or what, if anything, was said. Three weeks after the date of the document she gave birth to a child. At the time she signed the document she was looking after a sick child in her house

and she says she was not well. She said she signed papers just because her husband asked her to, and she never knew what they were, that she had confidence in him and signed them when he handed them to her.

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The evidence of Clara Cable shows that Tina Stephenson was at the store the night when William Stephenson signed the document, and at that time, apparently, all the defendants were present, and perhaps she then signed it there.

There is not the slightest evidence that she knew anything about the financial position of the Company at that time. The learned trial Judge, as to the then financial standing of the Company, states as follows: "The husband was the president and apparently the general manager of the concern. It was on its last legs. The husband and the creditors knew this." There is no direct evidence to support this statement of fact. The husband did not give evidence, and there was no evidence as to his or the creditors' belief in this matter further than the fact that the plaintiffs were pressing for payment, and the fact that six months later the Company assigned and probably paid only fifteen per cent.

A witness Moore, a man in the employ of the Company, was called, and he swore that, before William Stephenson signed, he asked the witness as to the business prospects of the Company and the answer was: "Well, I told him I thought the business was all right, and he said Bert wanted him to go on this guaranty." I should infer from this that the witness Moore, one of the Company's buyers, thought that matters were not then in a bad condition; indeed, in another part of his evidence, he says he thought the business was quite sound. I would not infer from the assignment six months later that the Company was necessarily insolvent when the document was signed. Perhaps they had a

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trading name, or a good will, which was valuable to a going concern and yet of no use under the hammer.

There is no evidence that the husband knew the Company was insolvent, or that it in fact was insolvent at that time. One would think it difficult to believe that he had any such thought, and that he deliberately tried to entrap his wife and his father and mother into such a financial loss.

After re-reading the evidence of the wife, I can only conclude, if her evidence is true, that she would have signed the document if her husband had fully explained it to her and told her the true state of the business, and had expressed a belief that, with the guaranty, the business could float, and her stock might thereby be made worth something. There is no evidence that he had not such a belief, nor that such a belief might not be a reasonable one.

For some reason the husband was not called as a witness, and, in my mind, this raises a suspicion, perhaps he could have jogged her memory; but, as it is, we do not know where or why it was signed.

Upon this evidence it is claimed that she has proved the absence of independent advice and undue influence on the part of her husband.

By the statute law of Manitoba a married woman can deal with her property as fully and as uncontrolled as a *feme sole*, and she can enter into any contracts of any kind and make herself liable thereon regardless of her husband quite as freely as if she were unmarried, and she can bring an action in her own name for the protection of her property even against her husband.

It is not to be overlooked that in this case she had a financial interest in the Company and in its success and was one of its officers.

The law involved in this case has recently come up for

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discussion in the highest courts of the realm. The case of *Bank of Montreal v. Stuart*, [1911] A.C. 120, decides that in a case like this the onus is upon Tina Stephenson, and it seems to me the language of Sir Charles Moss in *Euclyd Avenue Trusts v. Hobs*, 24 O.L.R. 450, epitomizes that decision. He says:

"It must now be accepted as settled by authority that, in a case like the present, the absence of independent advice is not in itself a sufficient reason for treating a security given by a wife for the benefit of her husband as a void transaction. If undue influence on the part of the husband is relied upon the burden of proof lies upon those who allege it." A

In the case before the Privy Council the peculiar relationship existing between the husband and wife and her feeble condition were well known to the solicitor of the Bank before she signed the document there impeached. In this case there is no pretence that the plaintiffs knew anything about any supposed influence the husband had over the wife or of her condition.

I am very much troubled in this matter by language used by Lord Justice Vaughan Williams in *Chaplin v. Brammall*, [1908] 1 K.B. 237. It is a decision of the English Court of Appeal and of course prior to the Privy Council decision above referred to. In that case he uses the following language:

"But the result is that the plaintiffs, who, through their agents, were undoubtedly aware that the execution of this guaranty was to be procured through the guarantor's husband, who was living with his wife at the time and would presumably have the influence of a husband over her, failed to show that the document was properly explained to her."

I take that language to mean that, if the plaintiff knew, as in this case he did know, that the execution of the document was to be procured by the husband from his wife with whom he was then living, he would be presumed to have an undue influence over her, and that it

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would be upon the plaintiff to show that the document was properly explained to her. To support that view of the law, he cites *Bischoff's Trustee v. Frank*, 89 L.T. 188; but his attention seems not to have been called to the fact that the language of Mr. Justice Wright, reported there, was not approved of when the case was heard in appeal.

If I read the above case in the Privy Council correctly, then I think this principle laid down by Lord Justice Vaughan Williams has been overruled.

It will be observed that this case differs widely from *Turnbull v. Duval*, [1902] A.C. 429. In that case Mrs. Duval was strongly urged and pressed by her husband to sign the document, and the document was wholly different from what she thought it was when she signed it; and there is a further great difference in that case—her trustee was the agent of the plaintiff and used his influence in the matter. In this case there is not the slightest evidence that the wife was pressed or persuaded by her husband to sign the document, nor that the document was different from what she had expected.

The last-mentioned case was referred to in *Howes v. Bishop*, [1909] 2 K.B. 402, and the *Turnbull* case, above referred to, was also there discussed and explained. It might be pointed out that in the *Chaplin* case the document was prepared by the plaintiff and was given to the husband with instructions to get his wife, the defendant, to sign it; and that aspect of the case is dwelt upon by the learned Judge in that case. It was found in that case as a fact that she did not understand what she was signing.

From the facts proved in this case I cannot say that the transaction brought about was immoderate or irrational. She was an officer of the Company and it was her duty to assist in looking after the affairs of the Company; she was a shareholder, and there is no evidence to show that

she might not fairly think that the carrying on of this account might benefit the Company, and help them through their present difficulty.

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As to undue influence, the only evidence we have is her own testimony, in which she tells us that she knows nothing whatever about the matter, and that she simply signed what her husband asked her to sign. The husband could, no doubt, have told us the whole story, and he is not called, and no excuse of any kind is put forward to account for his absence from the witness box. This certainly to me looks suspicious.

There is another aspect to this case. The plaintiffs refused to go on any further with the account without security, and, acting upon that, the manager of the Company deliberately brought to them a document signed by all the parties, and the plaintiffs had no notice, or knowledge, of any undue influence or want of information of any of the parties. The plaintiffs acted upon that, extended the time of credit and advanced other goods, and materially changed their position. It seems to me under principles laid down in *Talbot v. Von Boris*, [1911] 1 K.B. 854, the plaintiff, who had no knowledge of any undue influence, would be entitled to succeed.

It is true that in that case the action was upon a promissory note, but, at p. 863, Lord Justice Farwell holds that the same principles would apply if it were a simple contract.

I concur with Mr. Justice Perdue as to the disposition of the various appeals and the costs.

PERDUE, J.A. This is an action on a guaranty by the defendants given to secure to the plaintiffs the then existing and the future indebtedness of the Stephenson Furniture Co., Ltd., the liability on the guaranty being limited to \$2,600. The guaranty purports to be signed by the defendants James Albert Stephenson, his wife Tina

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Stephenson, and William and Margaret Stephenson, the father and mother of James Albert Stephenson.

The Stephenson Furniture Co. had been doing business with the plaintiffs for a number of years. The Company seems to have been largely owned by the members of the Stephenson family. James Albert Stephenson was president and manager. His wife was the secretary of the Company and a shareholder in it. William Stephenson, the father of James Albert, was a shareholder and Margaret Stephenson's money, to the extent of \$10,000, was invested in the Company, her money having purchased the shares held by her husband William Stephenson.

Prior to 1st November, 1908, the Company had been slow in making its payments and appeared to have difficulty in meeting its obligations. The plaintiffs about that date informed J. A. Stephenson, who was the president of the Company, that unless payments were made more satisfactorily they would stop supplying goods. The plaintiffs did in fact cease to supply goods to the Company, except for cash. J. A. Stephenson then proposed to Remington, the plaintiff's manager in Winnipeg, the giving of a guaranty to the plaintiffs by his father and mother in order to procure an extension of six months on his account. This proposal was transmitted to the head office of the plaintiffs at Toronto, and agreed to by them. I cannot find any mention of Tina Stephenson's name as a proposed guarantor at that time. After the plaintiffs had agreed to the proposal, J. A. Stephenson had the guaranty prepared in his office by one of his employees. The form of it was submitted to Remington, who expressed himself satisfied with it. Some delay took place in getting it executed, but finally it was handed to Remington by J. A. Stephenson on 21st November, 1908, with the names of the four guarantors appended.

On receiving the guaranty the plaintiffs continued to



supply the Stephenson Company with goods, the amount supplied after that time being some \$1300 or \$1400. On 27th April, 1909, the business of the Company went into liquidation.

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The name of Margaret Stephenson was signed by her husband, the words "per Atty." being placed underneath the name. William Stephenson says he signed for himself and his wife. He held a power of attorney from her, but it did not authorize him to sign a document of the nature of the guaranty in question. There is no evidence to show that she in any other way empowered her husband to execute it for her, or that she ever ratified his action in so doing. I agree with the learned trial Judge that the plaintiffs' case fails as against Margaret Stephenson.

The question of Tina Stephenson's liability presents great difficulty. The defence set up in the pleading is, in effect, that she had signed the guaranty under the influence of her husband and without any legal or other advice, believing that she was signing a formal document for the purposes of the Company and without the intention of rendering herself liable by way of guaranty. She further alleged that she was induced to sign it by the fraud of the plaintiff and its agent, her husband, who did not disclose to her the fact of the company's indebtedness to the plaintiff, and that the Company was then unable to pay its obligations. At the trial she was called by the plaintiff in order to prove her signature to the document. She was then cross-examined by her own counsel. Much of her evidence was elicited by questions put to her by her own counsel in such form that the question suggested the answer. Evidence obtained in that way must be taken with some suspicion, especially where it is not supported or corroborated by any other testimony whatsoever. One should be particularly careful in scrutinising evidence procured in that way when it is the only evidence adduced

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to support allegations of undue influence and fraud. She could not remember where she signed the document or who asked her to sign it, but she thought it must have been her husband. She stated that it was not read to her or explained to her and that she did not understand its effect. She said she would sign papers when her husband asked her to sign them and never questioned them. On re-examination she admitted that she had no recollection whatever as to signing the document.

Since the decision of the Privy Council in *Bank of Montreal v. Stuart*, [1911] A.C. 120, it must be taken as established that in the case of husband and wife the burden of proving undue influence lies upon those who allege it. It is, therefore, incumbent upon Tina Stephenson to establish that she was induced to sign the document by undue influence on the part of her husband, or that she was so deceived or misled that it was not binding upon her. No evidence except her own was offered in support of her contention. She had no recollection of what took place when the document was signed. She did not positively state that her husband asked her to sign it. She inferred that her husband must have asked her to sign it. She was willing to sign anything he would ask her to sign. There is no evidence of duress or undue influence or deception having been made use of to procure her signature. The most that can be made of her evidence is that she had complete confidence in her husband and would sign any document he asked her to sign, without inquiry and quite reckless as to what it contained.

In *Bank of Montreal v. Stuart*, Lord Macnaghten said:

"It may well be argued that when there is evidence of overpowering influence and the transaction brought about is immoderate and irrational \* \* proof of undue influence is complete."

If we accept Tina Stephenson's statement as to her

husband's influence over her, and the complete confidence she reposed in him, was the transaction in question immoderate and irrational? Tina Stephenson was the secretary of the Stephenson Company. She was a shareholder in it. Money belonging to her had been invested in it. It was to her interest that the Company's business should continue and that it should be saved from going into liquidation. Her husband evidently believed that if the difficulties in which the Company found itself in November, 1908, could be tided over, it would pull through. Moore, who was buyer for the Stephenson Company and had charge of its sales department, informed William Stephenson at the time the guaranty was given that he thought the business was all right. Moore watched the record of sales and the profits made, and did not consider the Company was in bad shape. He says that its last statement showed a large surplus. The giving of the guaranty procured an extension of time from the plaintiffs and a further supply of goods was sold to the Company on credit. It appears to me that the giving of the guaranty was a reasonable transaction by which the shareholders hoped to save their property. I cannot find that it was immoderate or irrational. It cannot be regarded as a voluntary gift on the part of Tina Stephenson. She had a personal interest in saving the Company and if, by giving the guaranty, the Company succeeded in re-establishing itself, she would profit along with the other shareholders.

Even if the circumstances under which Tina Stephenson executed the guaranty afforded evidence of undue influence on her husband's part, can that defence prevail against the plaintiffs unless knowledge that undue influence was exercised is brought home to them?

In *Bank of Montreal v. Stuart*, the Bank was fixed with notice through the solicitor who acted for the Bank, and was instrumental in obtaining the guaranty, and

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who also, as the Court held, acted on behalf of Mrs. Stuart when the guaranty was obtained. It is urged that the present case is similar to *Chaplin & Co. v. Brammall*, [1908] 1 K.B. 238. The facts of that case are more fully reported in 97 L.T. 860. The husband of the defendant desired to purchase goods from Chaplin & Co. The latter, after some verbal negotiations, wrote to him stating that if his wife became his surety in £300 they would allow him cash discount on goods to that amount and treat it as a deferred debt. With this letter a form of guaranty was sent for the wife's signature. The husband obtained his wife's signature by fraud. He covered up the instrument when it was placed before her for signature and, when she asked him what it was, he said she would not understand it and that it was only a formality. In giving the judgment of the Court of Appeal, Vaughan Williams, L.J., said:

"Those who, as representing the plaintiffs, prepared and sent to the defendant's husband the document sued upon, in order that he might procure his wife's signature to it, so that the plaintiffs might have security in respect of the business transactions into which they were about to enter with him, were, when they did so, clearly cognizant of the fact that the influence of a husband was being employed to obtain the signature of his wife to that document. That being so, I am sorry for the plaintiffs that they turn out not to be in a position that any proper explanation of the instrument which she was about to sign was given to the defendant before she signed it \* \* \*. It is unfortunate that the plaintiffs did not take care to see that the defendant had independent advice in the matter."

It is clear that that eminent Judge took the view that the burthen of proof that the wife had independent advice lay upon the plaintiffs. This is contrary to the principle laid down in *Nedby v. Nedby*, 5 De G. & S. 377, and approved by the Privy Council in *Bank of Montreal v. Stuart*. He followed the decision of Wright, J., in *Bischoff's Trustee v. Frank*, 89 L.T. 188, who ap-

proved *Huguenin v. Baseley*, 14 Ves. 273, and declined to follow *Nedby v. Nedby*. *Bischoff's Trustee v. Frank* was reversed in the Court of Appeal; the decision in the latter Court was not reported, but a full note of it appears in *Howes v. Bishop*, [1909] 2 K.B. 390. Vaughan Williams, L.J., in *Chaplin & Co. v. Brammall*, relied greatly upon language used by Lindley, L.J., in *Turnbull v. Duval*, [1902] A.C. 429, 434. In that case Lindley, L.J., said:

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"It is, in their Lordships' opinion, quite clear that Mrs. Duval was pressed by her husband to sign, and did sign the document which was very different from what she supposed it to be, and a document of the true nature of which she had no conception. It is impossible to hold that Campbell or Turnbull & Co. are unaffected by such pressure and ignorance. They left everything to Duval, and must abide the consequences."

But the real principle upon which *Turnbull & Co. v. Duval* was decided was that a document had been obtained by Campbell, who was the plaintiff's agent and was also Mrs. Duval's trustee, from her, his *cestui que trust*, by pressure through her husband, who also misled her as to the nature of the document. The Court declined to say whether the security could have been upheld if the only ground for impeaching it was that Mrs. Duval had no independent advice.

The remarks of Collins, L.J., in giving judgment on the appeal in *Bischoff's Trustee v. Frank*, cited in *Howes v. Bishop*, [1909] 2 K.B. 397, are, it seems to me, particularly applicable to the present case. In the *Bischoff's Trustee* case there was considerable pressure exerted by the husband upon the wife to induce her to sign the guaranty. It was a complicated document and was read over to her by her husband's solicitor, but its contents were not explained to her and she had no independent advice. Collins, L.J., said:

"It seems to me that the burden is upon the lady in

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this case, and the facts standing as they do her evidence is worth nothing. \* \* The burthen is thrown upon you to show that there is some element, *with which, I think, you must connect the plaintiff*, to fraudulently induce this lady to give the guaranty."

In the same case Romer, L.J., said:

"The learned Judge says that the husband is to be treated as a voluntary donee from the wife, because the wife was going to guarantee the husband's debts. That being so, the plaintiff must be taken as a person who knows that, and therefore has the onus of proving that there was no undue influence. I never heard of such a thing."

I cannot find that the broad statement made in *Chaplin & Co. v. Brammall*, that a creditor taking from a debtor a security signed by the wife of the latter is bound to see that she understood the document and had proper independent advice, has been followed in any subsequent case. With deference, it seems to me that if the creditor had no notice of any improper influence on the part of the husband in obtaining the signature of his wife, and in consideration of the document, had given value or changed his position, the wife would be bound by it. A different result might, no doubt, follow if the creditor employed the husband to obtain the security and made him his agent in so doing, and the husband used improper means to obtain his wife's signature. It may well be that the view was taken in the *Chaplin & Co.* case that the creditors had made the husband their agent so as to be bound by his acts. It was also the fact that the wife in that case had been deceived by the husband as to the nature of the document she was asked to sign. He did not let her read it, she enquired what it was and he told her it was only a formality. Her signature was, therefore, procured by fraud.

The opinions expressed by Collins and Romer, L.JJ. in *Bischoff's Trustee v. Frank*, above referred to, strongly

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support the view that notice of undue influence exercised by a husband to induce his wife to sign a document must be brought home to the third party, to whom the document is negotiated, and who gives value upon the faith of it, in order to make such a defence available as against such third party. Upon this point the very late decision of the Court of Appeal in *Talbot v. Von Boris*, [1911] 1 K.B. 854, is instructive, and, to my mind, conclusive. That was an action against a wife upon joint and several promissory notes of her husband and herself, signed by her as surety for the repayment of sums advanced by the plaintiff to her husband. The wife pleaded that she was induced to sign the notes by duress on the part of her husband and that the plaintiff knew of that duress. Evidence was given by the defendant of the duress and the jury found that there was such duress. No evidence was given on the defendant's part to show the plaintiff knew of the duress, on the contrary she said she did not think the plaintiff knew of it. The plaintiff was not called and gave no evidence denying knowledge of the duress. It was held that the onus of proof with regard to the knowledge of the duress lay upon the defendant. A question was raised as to the effect of section 30 of the Imperial Bills of Exchange Act. That section was held not to apply and the question raised does not affect the authority of the decision in so far as the present case is concerned. The action was between payee and maker of the note and the principle applied in that case would be applicable to an ordinary guaranty given by a wife to a creditor of her husband to secure the debt of the latter.

In giving judgment in *Talbot v. Von Boris*, Vaughan Williams, L.J., said:

"Really the only substantial ground of defence in this case appears to be based on duress. As to that it is true that the defendant succeeded in getting a finding of the jury in her favor that her signature to the note was

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procured by duress, but she failed to get a finding in her favor as to knowledge by the plaintiff of that duress, for the jury found he did not know of it."

He then goes on to say that the only way the defendant's case could be put was on the contention that under section 30 of the Bills of Exchange Act the onus was thrown upon the plaintiff of proving that he gave value for the notes in good faith. That section, however, was shown not to apply.

Farwell, L.J., in the same case thus expressed his view:

"In my opinion the law as to onus of proof as regards duress is the same as between the maker of a promissory note and the payee who advances money upon it, as in the case of any other contract in respect of which duress is set up. To support such a defence, where the alleged duress is that of a person other than the person contracted with, *it must be shown that the duress by which the contract was procured was known to the plaintiff when he entered into the contract.* Therefore, if the jury negative knowledge on the part of the plaintiff, the plaintiff must succeed." Kennedy, L.J., was of the same opinion.

In the present case there is no pretence that the plaintiffs or their agent Remington, were aware of any undue influence or improper action on the part of J. A. Stephenson in procuring his wife's signature to the guarantee. On the facts as given in evidence Stephenson was in no sense the agent of the plaintiffs in obtaining her signature.

Tina Stephenson, however, contends that, apart from undue influence, she did not know the contents or nature of the document she signed, that she did not read or hear it read, and that therefore it is not binding upon her. But the evidence does not show that her husband in any way deceived her or misrepresented the nature and contents of the document. If she was not aware what the writing contained when she signed it, she had only her-



self to blame for failing to read it, or to enquire what it meant. She abstained from all enquiry and signed the document, being quite reckless as to what it contained or what use would be made of it. Taking her own testimony, she admits she signed the instrument but has no recollection as to when or where she signed it or what took place when it was signed. She does not remember who asked her to sign it, but thinks it must have been her husband. The remarks of Buckley, L.J., in *Carlisle Co. v. Bragg*, [1911] 1 K.B. at p. 495, are appropriate in considering the present case.

"The true way," he says, "of ascertaining whether a deed is a man's deed is, I conceive, to see whether he attached his signature with the intention that that which preceded his signature should be taken to be his act and deed. It is not necessarily essential that he should know what the document contains: he may have been content to make it his act and deed, whatever it contained; he may have relied on the person who brought it to him, as in a case where a man's solicitor brings him a document, saying, 'This is a conveyance of your property,' or 'This is your lease,' and he does not enquire what covenants it contains, or what the rent reserved is, or what other material provisions in it are, but signs it as his act and deed, intending to execute that instrument, careless of its contents, in the sense that he is content to be bound by them whatever they are. If, on the other hand, he is materially misled as to the contents of the document, then his mind does not go with his pen. In that case it is not his deed."

In the present case we are left in the dark as to what was said or what took place when the document was signed. That Tina Stephenson signed it is the only fact in connection with the signing that is clearly proven. It is for her to show that she was so misled and deceived as to its actual contents that the signing was not binding upon her. This she has failed to show.

By the law of this Province, "a married woman shall be capable of entering into and rendering herself liable

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on any contract and of suing and being sued in contract, or in tort, or otherwise, in all respects as if she were a *feme sole*:" R.S.M. 1902, c. 106, s. 11. She is also capable of acquiring, holding and disposing of, by will or otherwise, any of her property in the same manner as if she were unmarried: sec. 3. An enormous quantity of property in Manitoba is owned by married women. They are frequently shareholders and directors of companies, and they engage in almost every class of business. It would be disastrous if a married woman could disregard or evade a contract entered into by her, upon which value has been given in good faith, merely by saying, "it is true I put my name to the document, my husband asked me to sign it and I signed it, but I did not read it or hear it read, and I did not enquire, or find out, or care what it meant, therefore I am not bound." This is in brief the contention of Tina Stephenson in this case.

In my opinion she failed to prove undue influence, but even assuming that she proved it, she has failed to bring home to the plaintiffs knowledge that it had been used. She has also failed to show that her signature was obtained by fraud or deception or concealment so as to render the document void as against her.

I agree with the learned trial Judge's finding that the two male defendants are liable. The judgment should be amended so as to make Tina Stephenson liable along with them. The nonsuit as to Margaret Stephenson should stand. J. A. Stephenson, William Stephenson and Tina Stephenson should pay the plaintiffs' cost of suit. The first two should pay the costs of the appeal brought by them. Tina Stephenson should pay the costs of the plaintiffs' appeal as against her, and the plaintiffs should pay Margaret Stephenson her costs of their appeal against her.

CAMERON, J.A. Legislation affecting and extending the rights of married women in this Province is first to be

found in the Statute 38 Vic. c. 25 (1875), An Act respecting separate rights of property of Married Women. Following this we find the consolidated Act of 1880, c. 65, further enlarging the rights and liabilities of married women and the amendments of 1881, c. 11, ss. 72-81, in which it is provided, amongst other things, that tenancy by the curtesy be abolished (s. 73): that "Any married woman shall be liable on any contract made by her respecting her real estate as if she were a *feme sole*" and that she can be sued on such contracts separately from her husband.

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Then followed the provisions respecting real estate to be found in 52 Vic. c. 16. ss. 31-33, and those in the Act (53 Vic. c. 17) respecting Conveyances of Real Estate by Married Women. All the foregoing are consolidated in the Revised Statutes of 1892, c. 95.

There was a short amendment in 56 Vic., c. 9, and by 63-64 Vic., c. 27, the law was consolidated and amended and the rights and liabilities of the married woman further amplified. By section 3, she is declared capable of holding and disposing of property as if she were unmarried, and by section 11, is made capable of entering into and becoming liable on any contract "in all respects as if she were a *feme sole*." This last Act was repealed and re-enacted in the Revised Statutes of 1902, c. 27.

The English Married Women's Act of 1882 is in many respects similar to our own, but a comparison shows that our own legislation has gone, in some respects, further in the emancipation of married women than has the law in England.

The married woman, like the unmarried woman, is, it need hardly be stated, protected by our laws against fraud, misrepresentation and unfair dealing.

The status of the married woman in respect of property at Common Law, and the progressive legislation of the Province of Ontario dealing with her enfranchisement

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(legislation similar to our own) were dealt with in *Bank of Montreal v. Stuart*, by Mr. Justice Idington in the Supreme Court, 41 S.C.R. 530 *et seq.*, both as to her property rights and her power to contract. "What right," he asks at p. 532, "have we to cut down the express power so given." The effect of this legislation was discussed by Mr. Justice Mabee, who tried that case, 17 O.L.R. p. 44. "If any such rule (*i.e.* that requiring independent advice) is applicable to transactions between husband and wife, the sooner the Legislature repeals the Married Woman's Property Act, and reverts to the old law of requiring examination apart from the husband, the better for the security of the public." Chief Justice Moss of the Ontario Court of Appeal, who held that the judgment of Mabee, J., dismissing the action, should be vacated, said, at p. 453:

"Having regard to the freedom now accorded to married women in this Province to deal with their separate estate as freely and effectually as a *feme sole*, it may seem strange that safeguards are to be adopted which are not required and could not be called for in the case of a *feme sole*."

Nevertheless he holds that "she must be protected not only against her husband but against herself," p. 452. In the argument before the Privy Council, counsel for the Bank referred to the legislation as inconsistent with the decision in *Huguenin v. Baseley*, at p. 123.

The effect of The Married Women's Property Act in England upon these restrictions was discussed in *Howes v. Bishop*, as that case is reported in 78 L.J.K.B. 796. The matter is raised by counsel at p. 804, and is referred to by Lord Justice Farwell at p. 809. In the same case in [1909] 2 K.B. 394, Farwell, L.J., says: "I do not see how, at any rate since the Married Woman's Property Act, 1882, the rule in *Huguenin v. Baseley* can be said to cover the relation of husband and wife."

Now the rule at Common Law was that a married

woman cannot bind herself by contract at all. If she attempts to do so "it is altogether void and no action will lie against her husband or herself for the breach of it:" *Pollock on Contracts*, 83; *Liverpool v. Fairhurst*, 9 Ex. 429.

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I would say that anyone, having this conception of the rights and status of a married woman as they were prior to the legislation referred to, and then perusing that legislation from 1875 down to the last revised statute on the subject, would, not unreasonably I submit, come to the conclusion that it was the intention of the Legislature that a married woman should be at liberty to enter into a lawful contract of any kind free from any restrictions or disabilities, and to bind herself effectively thereby, and that that intention had been adequately expressed by the Legislature. That is to say, such might fairly be the reader's conclusion if he avoided a consideration of the decisions of the Courts bearing on contracts of a character such as that now before us.

Counsel for the defendant Tina Stephenson, wife of the defendant J. A. Stephenson, rely upon *Turnbull v. Dural*, [1902] A.C. 429, and *Chaplin v. Brammall*, [1908] 1 K.B. 233. In the former case the security given by Mrs. Duval for the benefit of her husband was open to attack on two grounds, viz.: first, because of the want of independent advice on her part, it having been obtained from her by one who was a trustee for her, acting through her husband, and, second, in that it was obtained from her by her husband through pressure and by concealment of material facts. The judgment of the Privy Council did not finally pass upon the first ground, but was based upon the second.

"It is, in their Lordships' opinion, quite clear that Mrs. Duval was pressed by her husband to sign, and did sign, the document which was very different from what she supposed it to be, and a document of the true nature of which she had no conception. It is impossible to hold

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that Campbell or Turnbull & Co. are unaffected by such pressure and ignorance. They left everything to Duval, and must abide the consequences."

In *Chaplin v. Brammall*, *supra*, Lord Justice Vaughan Williams, who delivered the judgment of the Court, refers to the judgment in *Turnbull v. Duval*, and says:

"So here the plaintiffs left everything to the defendant's husband; they furnished him with the document that he might get his wife's signature to it, and they must take the consequences of his having obtained it without explaining to her or her understanding what she was doing."

The circumstances of this case now before us seem, to my mind, closely to resemble those which gave rise to *Chaplin v. Brammall*. Tina Stephenson's evidence, which is not disputed, is to the effect that she did not remember when she signed the document, that it must have been her husband who asked her to do so, that there was no explanation of it given, that it was not read over to her and that she did not know she was signing a document that might make her liable for a large amount. It is true that in the *Chaplin* case the document was furnished by the plaintiffs, while here it was prepared and submitted to them by J. A. Stephenson, who suggested the names of those whose signatures he could procure to it. But whether the plaintiffs prepared the document and furnished it to the husband, or whether they adopted a document prepared and submitted to them by the husband is, to my mind, not material. It is as if they said to the husband: "That document you have prepared and the names you have suggested are good enough for us. Now you get that signed for us by your wife and the others and we will accept it as satisfactory and continue your credit." That is to say, from the moment they accepted the document as sufficient in form, they left everything to the husband, authorized him to procure his wife's signature with the others, took the benefit and the risks

attendant on the guaranty, whatever they were, when they received and accepted it as a completed document, and became, thereupon, affected with knowledge of the circumstances surrounding its execution. Can the transaction, in this phase, be looked at in any other light? In my humble judgment, it cannot.

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I am unable, for my part, to attach material importance to the fact that, in this present case, the married woman was interested in the Company as an official and shareholder. Had she not been such, she would still have had a manifest interest in the resources and means of livelihood of her husband, which he sought to protect by this guaranty. It is impossible to say that the fact that she was a shareholder influenced her action in the slightest. In fact it may be deduced from her evidence in this case that she was ready and willing to sign any document presented to her by her husband without asking any explanation of it. But, taking that for granted, was not the existence of that unlimited confidence a cogent reason why she should have been made fully aware of the nature and effect of the contract the husband was asking her to enter into?

In the *Turnbull* case it is to be noted that Campbell said Duval first suggested the security of the wife, while Duval said the contrary. The Privy Council does not appear to have regarded the point as of importance (p. 432); but found the arrangement was that Campbell (the agent) should have the security prepared and that Duval should get his wife to sign it. Here the arrangement was that Stephenson should prepare a security to be satisfactory to the plaintiffs and, after its approval by the plaintiffs, that he should get his wife's signature to it. Here as there (in the *Turnbull* case) the plaintiffs knew that the relationship of husband and wife existed and that the husband was, with their authority, to procure the signature of his wife to a document imposing a liability

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on her for their benefit. Surely in these respects there is no material difference between the two transactions, no such distinction between them in the facts as deprives the Privy Council judgment of applicability to this present case.

In *Talbot v. Von Boris*, [1911] 1 K.B. 854, a wife was held liable upon a joint and several promissory note signed by her with her husband for advances made by the plaintiff to him, the defence being duress of the wife by the husband, which the jury found as a fact. It was held that the onus of proof with regard to knowledge by the plaintiff of the duress alleged lay upon the defendant, and was not shifted by section 30, s.s. 32, of The Bills of Exchange Act, and that, in this respect, there is no difference between a promissory note and any other contract (per Farwell, L.J., at p. 862). The action was brought in respect of two promissory notes, one for £100 and the other for £400. As to the £100 note the jury found that the substance of the transaction was explained to the wife; that as to the £400 it was not, but that she did know she was incurring a liability for the benefit of her husband. These findings are stated in the report of the trial proceedings, 27 T.L.R. p. 95, and apparently disposed of this defence, as appears by the judgment of Mr. Justice Phillimore, at the trial. In the report of the case on appeal at p. 266 of the same volume, the following appears:

"Lord Justice Vaughan Williams, after going through the facts of the case and reading the questions put to the jury with their answers thereto, said it was clear that the defendant; when she signed each of these promissory notes, knew what she was doing, in the sense that she knew that what she was signing was a promissory note, and that it was a document which would give the plaintiff a claim on her." The footnote at p. 855 of the appeal report, shows that the defence that the transaction had not been sufficiently explained to the wife was



unsuccessful and was considered as finally disposed of by the findings of the jury.

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It can well be argued that, if the defence that the defendant was not made aware by her husband of the nature of the document which she signed at his request was established, the knowledge, or want of it, of those facts by the plaintiff was immaterial. This inference is deducible inasmuch as the question as to the knowledge of the plaintiff submitted to the jury referred to duress only and not to insufficient explanation and knowledge. The distinction may lie in this,—a contract, entered into by a married woman under pressure from her husband and in ignorance of its contents, is wholly void, there being no consensus on her part and therefore no more a contract binding on her than if her signature had been forged; while, on the other hand, a written contract signed by her under the duress of the husband, she being aware of its nature and the liability imposed by it, is voidable only, and existing in full force until impeached, and hence the knowledge of those facts, or want of it, by a holder for value, or by a party taking a security and thereby changing his position, becomes a vital question; at any rate it would appear that some such distinction was present in the mind of Mr. Justice Phillimore when he framed the questions to be submitted to the jury.

Be that as it may, it is not necessary to go so far in this case now before us, because I cannot, for my part, avoid the conclusion that, by acts, words and acquiescence, the plaintiffs authorized the husband to secure to the guaranty the signatures suggested by him, including that of his wife. If J. A. Stephenson had not received that authorization, he would have dropped the matter then and there, and that would have been an end of it.

In *Howes v. Bishop*, [1909] 2 K.B. 390, Lord Alverstone refers to *Chaplin v. Brammall* with approval, "in that case there was a finding that the wife's signature

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was obtained without sufficiently informing her of, and explaining to her, the contents of the document, and that she did not understand it when it was signed by her." Farwell, L.J., at p. 402, says: "In that case Vaughan Williams, L.J., said, with reference to the facts, 'Ridley, J., has come to the conclusion that in fact no sufficient explanation of it was given to her, and that she did not understand it.' On these facts that case was a perfectly plain one, and I fail to see why it was reported." In other words, Lord Justice Farwell held that *Chaplin v. Brammall* was an accurate statement of an elementary and perfectly clear principle of law.

I quote the following from Halsbury, XV, par. 1017: "Though a creditor is not bound in every case to inquire into the facts under which a third person becomes surety to him for another, he must do so when the circumstances of the case or the dealings between the parties are such as to suggest the existence of fraud, or a fiduciary relation subsists between the principal debtor and the surety. He must apparently also inquire when the intending surety is the wife of the principal debtor, though there is no general rule of universal application that the rule of equity as to confidential relations necessarily applies to the relation of husband and wife, so as to throw on the husband or on the person who is suing the wife the onus of disproving an allegation of undue influence."

The present state of the law on the subject is thus summarised in *Lush on Husband and Wife* (1910) 206:

"In case of a disposition by a wife in favor or for the benefit of her husband, it is necessary that she should understand the effect of her disposition, but, save as a means to that end, it does not seem necessary that she should have independent advice."

I think the conclusion must be that, whatever may be the rule as to other contracts, where it is a case of suretyship by the wife for the benefit of the husband, if, in fact, the wife signs the document at the request of her husband, if no sufficient explanation of it is given to her

and she does not understand it, and if the creditors taking the security have "left everything" concerning the obtaining of the wife's signature to the husband, then, given those facts, those creditors, in an action against the married woman on the security, must fail. If creditors, in such cases, choose to enlist, or adopt, the services of the husband in obtaining security for their claims from his wife, they do so at their peril. But it is open to them to put themselves in a safe position by seeing to it that the married woman, before entering into the contract, has the advantage of impartial legal opinion, or, at any rate, that she understands, beyond any peradventure, the nature of the obligation that she is assuming and the circumstances giving rise to it.

The English Courts have apparently had in mind that husbands are prone, in hours of financial need, to turn to their wives (if and when the wives are possessed of independent means) and, imposing on their confidence, persuade or procure them to become liable as sureties for their (the husband's) debts, carelessly or carefully neglecting to disclose to their life partners the cash responsibilities imposed by the instruments the wives are asked to sign. No doubt there have been many such transactions where the devotion of the wife has been abused and she has become involved in poverty or serious loss without ever knowing how it all happened. From these considerations it is likely that the rule arose that, if it be shown by the married woman that she was not given sufficient information to understand fairly the purport of and reasons for the document she is asked by her husband, at the instigation of his creditors, to sign, then she is freed from any responsibility thereon. It is true that the existence of the relation of husband and wife is no longer sufficient, as to this defence, to divest the wife of the *onus probandi*. But, if the defence be established that the wife was asked

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or urged by the husband, with the authority of creditors, to sign, and did sign, an instrument of suretyship which was not sufficiently explained to her, as to the material facts in connection with which she was left uninformed, and without understanding her possible ultimate responsibilities, then she is absolutely incapacitated to contract. It is instructive to note that this rule laid down by the Courts for the purpose of protecting married women from their husbands, their husbands' creditors and themselves, has been put in statutory form in several of the United States, where a married woman is expressly prohibited by law from becoming surety for her husband: *Cyc.*, XXI, 1821.

The rule in question is a rule of equity in the opinion of Farwell, L.J., in *Howes v. Bishop*, *supra*, 394. If the rule first found authoritative expression in *Turnbull v. Duval*, as it seems to me it did, it became grafted on the English law long after The Married Women's Property Act of 1882. At any rate, once it affected our jurisprudence, it can hardly be said, with absolute accuracy, and without qualification, that a married woman is capable of entering into any contract in all respects as if she were an unmarried woman, notwithstanding the statute.

There may be a question as to whether *Turnbull v. Duval* is closely in point, though, to my mind, it is; but, in any event, there is not, in my opinion, any material difference between the facts here and those in the *Chaplin* case. The judgment of the Privy Council in *Trimble v. Hill*, 5 A.C. 344, enjoins us to follow the decisions of the English Court of Appeals in cases such as this. There are differences, as I have stated, between the English statute law and that of this Province relating to married women and their property, but they are not sufficiently important to enable us to consider this in-

junction inapplicable. I consider that we must hold ourselves bound by the judgment in *Chaplin v. Brammall*.

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I think the appeal against the judgment of nonsuit in favor of Tina Stephenson must be dismissed. In other respects I concur in the judgment of the Court.

HAGGART, J.A., concurred with Perdue, J.A.

### COURT OF APPEAL.

#### PETTIT V. CANADIAN NORTHERN RY. CO.

Before HOWELL, C.J.M., PERDUE and CAMERON, J.J.A.

*Railways—Railway Act, R.S.C. 1906, c. 37, s. 276—Train moving backwards over level crossing in city without any person on end car warning of its approach—Negligence—Common employment—Several tortfeasors contributing independently to the injury—Act respecting Compensation to Families of Persons Killed by Accident, R.S.M. 1902, c. 31—Lord Campbell's Act—Damages limited to amount of pecuniary loss.*

Action by the widow and administratrix of the estate of John Pettit under the Act respecting Compensation to Families of Persons Killed by Accident, R.S.M. 1902, c. 31, and under the Railway Act, R.S.C. 1906, c. 37, for damages for the death of her husband who was killed in consequence of the collision of a street car moving across the tracks of the defendants' railway, where they crossed a street of the city of Winnipeg on the level, with the end car of a freight train of the defendants moving backwards, as it was alleged, without any person on the end car giving any warning of its approach. The deceased was a watchman in the employ of the defendants and his duty was to watch for the approach of street cars and give the signal to stop if a train was approaching or to proceed if the railway track was clear.

At the time of the accident, which was near midnight on a very dark night, the deceased, not being able to see the approaching train, as found by the trial Judge, and having heard no whistle or bell, gave the signal for the street car to proceed, which it did, when it was struck by the end car of the train and overturned upon the deceased, killing him. The trial Judge found, upon the evidence set out in the judgment, that neither the whistle had been blown nor the bell of the engine sounded on approaching the crossing and that, if there was any person on the end car at the time, he had not given any warning to persons crossing or approaching the railway, as required by section 276 of the Railway Act,

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*Held*, (1) The plaintiff could not recover at common law, for the deceased and the crew of the train were fellow servants of the defendants.

*Waller v. South Eastern Ry.*, (1863) 2 H. & C. 102; *Morgan v. Vale of Neath R. Co.*, (1865) L.R. 1 Q.B. 149, and *Lovell v. Howell*, (1876) 1 C.P.D. 161, followed.

(2) Section 276 of the Railway Act is for the protection of employees of the railway company as well as of the public; *McMullin v. N. S. Steel & Coal Co.*, (1907) 39 S.C.R. 593, and *Lamond v. G. T. R. Co.*, (1908) 16 O.L.R. 365, followed, and the plaintiff was, on the above findings, entitled to recover.

(3) The fact that the motorman of the street car only slowed up and did not come to a full stop as he should have done before acting on the deceased's signal, although possibly creating a liability on the part of the street railway company for the result of the collision, could not prevent the recovery of full damages from the defendants.

"*The Bernina*" (1888) 13 A.C. 1, and *Burrows v. The March Gas & Coke Co.*, (1870) L.R. 5 Ex. 67, followed.

(4) The amount to be awarded for damages must be limited to the pecuniary loss to the plaintiff sustained because of the death and the mental sufferings of the widow should not be taken into account.

*Blake v. Midland*, (1852) 18 Q.B. 93; *C.P.R. v. Robinson*, (1887) 14 S.C.R. 105, and *Lamond v. G.T.R.*, (1908) 16 O.L.R. 365, followed. The deceased was 65 years old and was a strong healthy man, practically never ill. He was earning \$45 per month. The plaintiff, his widow, was 54 years old.

The Court reduced the damages from \$5000 the amount awarded by the trial Judge to \$3000.

DECIDED: 6th May, 1913.

Statement.

THE plaintiff was the administratrix of the estate of John Pettit, her deceased husband, and brought this action for her own benefit under the Act respecting Compensation to Families of Persons killed by Accident, R.S.M. 1902, c. 31, alleging that the death of the said John Pettit was caused by the defendant company's negligence.

The following judgment at the trial was delivered by

PRENDERGAST, J. That part of Main Street in the City of Winnipeg, where the accident happened, runs north and south, and, at its southern end, communicates with and opens onto a bridge, called the Norwood bridge, which spans the Red River.

The defendants own and operate a line of railway which intersects and crosses said Main Street almost on the line of junction of the latter with the said bridge, and the track of the railway at this crossing is level with the street.

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The Winnipeg Electric Railway Company own and operate a street car line which runs along said Main Street and over said bridge, and the track of this line, which is also level with the street, intersects the defendants' line where the latter crosses Main Street as aforesaid.

The southern end of Main Street, which, as stated, abuts on to the bridge and is crossed by the defendants' line, is higher than the main portion of said street, being taken up by what was called "the incline," which begins 62 feet north of the bridge on the street level and rises gradually till it reaches the bridge at the latter's top level, thus doing service as a bridge approach.

On June 22nd, 1911, the date of the accident, John Pettit was in the employ of the defendants, as watchman appointed by them pursuant to an order made by the Board of Railway Commissioners on October 16th, 1905, under section 269 of the Railway Act, ordering: "That the said crossing"—the crossing above referred to—"be protected by stationing at such crossing a watchman or watchmen, \* \* the said watchman or watchmen to be employed by the Canadian Northern Railway Company, who shall provide such shelter as may be necessary for him or them \* \* ."

This shelter had been provided for in the shape of a signal box or shanty, which is a small building about 7 feet square, standing 18 feet east from the street car track and about 8 feet north from that of the defendants.

It is shown that the fatality happened a short time before midnight on the date stated, and that it was caused, at the intersection above described, by the col-

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liding of a street car moving southerly with the end car of a freight train of the defendants moving backward and easterly, whereby the street car was thrown easterly of the track and toppled over on Pettit, who was then about 2 feet from the defendants' line, injuring him to such extent that as a consequence he died the next day.

The plaintiff contends that the accident was due to the negligence of the crew operating the freight train, and claims both at common law and under the Railway Act.

I will dispose at once of the claim at law, which does not require any further inquiry of fact than is above set out.

I do not think the plaintiff can succeed on this branch of her case, for the reason that Pettit and the train crew were discharging duties under common employment at the time of the accident. The distinction urged that the duties of the crew in operating the train were different from those of Pettit, who was watching at the crossing, does not seem sufficient to negative the character of common employment. They were all employed in a general way in connection with the service of the running of trains, and moreover, besides the application and use of the propelling power, it was also the crew's duty to give from the train all reasonable and proper signals or warnings to the public, the very duty which Pettit had also to perform on the level of the crossing.

In *Missouri, K. & T. Ry. v. Goss*, 72 S.W.R. 94, the action seems to have been under the statute only and so cannot support the distinction advanced. To what extent the courts have gone in refusing to accept such distinctions as fundamental was shown in *Waller v. South Eastern Ry.*, 2 H. & C. 102; *Morgan v. Vale of Neath Ry. Co.*, L.R. 1 Q.B. 149, and *Lovell v. Howell*, 1 C.P.D. 161.

*Dawburn*, in his work on *Employers' Liability*, 4th ed.,



p. 5, after stating that there are two essential ingredients in common employment—a common work and a common master—adds significantly:

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“What constitutes a common work and a common master often involves points of the greatest nicety. As regards common work, I cannot find a case of different occupation which has been held to constitute a good answer to the defence of common employment.”

This seems to me to be fatal to this branch of the plaintiff's case.

I should say, however, that, were the plaintiff not precluded, in my opinion, for the reasons stated, from setting up a Common Law liability, I should find in her favor on the facts, as will appear hereafter.

I now come to the case under the statute.

It was urged for the defence that the sections of the Railway Act on which the plaintiff relies are meant for the protection of the public and not of employees. In *McMullin v. N.S. Steel & Coal Co.*, 39 S.C.R. 593, it was held that section 251 of the Railway Act of Nova Scotia, which is similar to section 276 of the Dominion Act, is for the protection of servants of the Company standing on or crossing the tracks as well as of other persons. And in *Lamond v. G.T.Ry. Co.*, 16 O.L.R. 365, which is directly in point as the person injured was a watchman as in this case, the Court held that “Although the deceased was an employee of the defendants and it was his duty to protect persons crossing the tracks from the cars, he had a right to rely, as far as his own safety was concerned, on nothing being done to expose him to unnecessary danger, and on the above section (section 276 of the Railway Act) being complied with.”

The plaintiff may then avail herself of the statute.

Now, what are the facts? The evidence shows that the night in question was a very dark night. There was, however, an electric light near the foot of the incline, and another near the crossing. The distance from the

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crossing at which a car without lights on the defendants' tracks could be seen was variously estimated at from 40 to 200 feet.

It was Pettit's custom, as his duty required, to be on the look-out and whenever a train or street car was in sight to keep himself in the vicinity of the crossing, generally opposite the signal box, and perhaps more frequently somewhat to the south thereof. To a street car he would signal a clear road by producing a white light at night or a white flag in the day time, or give the stop order by producing a red light or red flag, also according to the time of day. C.N.R. trains having the right of way, there was apparently no occasion to give them the pass signal; but one of the train crew stated that it was his custom when coming near the bridge to whistle to the flagman, who would then come out with a red lantern and give him the pass order by waving it in a circle.

There were eleven witnesses for the plaintiff, all apparently reputable and most of them of the best standing in the community where they live, who seem to have been in a position to judge and know, and whose evidence is to the effect that when the train was approaching the bridge they neither saw the train itself or any man or light on it, nor did they hear any bell, whistle or other warning of any kind.

Walter Leslie, Miss Leslie and Miss Agnes Kasler were going over from Winnipeg to Norwood; they were familiar with the crossing, and knew that there might be danger there at all times. Mr. Leslie says that he would always be on the alert at the crossing. That night, when crossing the C.N.R. tracks, they neither saw any light nor heard any sound revealing an approaching train, although Mr. Leslie said that he always looks both ways before crossing and Miss Leslie says she actually looked in the very direction of the train; and they had proceeded

further only one minute, having covered less than 100 feet in the meantime, when the crash told them of the catastrophe.

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Then, there are the conductor of the street car and Mr. and Mrs. Treleaven and Miss Averal, who were passengers thereon. The conductor saw the train only when within 12 feet from it. Mr. and Mrs. Treleaven were so seated as to have a clear view of the track westward. The first says that he was naturally looking in front, and the latter says "I was looking towards the track for there was my life and I felt sure the track was clear," and the car was struck before they had realized that anything was coming. Miss Averal just caught sight of a box car coming in the dark when it was 8 or 10 feet away, and would call an untruth any assertion that there was a light on that car.

There was also on the incline, quite close to the street railway and about 37 feet from the C.N.R. track, a party of four waiting for a car to proceed to Norwood. The first car to come, which was the one in question, however, passed without stopping as they expected, which naturally caused them to follow it by sight as it went by. The collision occurred almost at once. These witnesses are John Gibson, William Knutson, Miss Kate McKenzie and Miss May Ross. The first is positive and the three others are moreover vehement in their declaration that they were in a position to hear and see, that they heard no sound of bell or whistle and that there was neither man nor light on the end box car.

On the evidence of these eleven witnesses, I come to the conclusion that there was no warning given. If the bell was rung at all as stated by one witness for the defence, it was not rung when near the bridge, or the sound of it at all events did not constitute a warning whatever may have been the cause, as it was not observed by intelligent people careful for their lives, who were

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apprehensive of danger and were listening for just such warning. The same may be said about a light on the last car. I may say that the testimony of Dowdle and Wilkinson does not commend itself to me at all; but it is sufficient that the evidence should show that, if there was such a light there, it was of such a nature or in such condition or held or placed in such position that it could not be seen by people watching for such signal, and that it was consequently useless as a warning.

The evidence also shows that Pettit was there in the proper place at the proper time, active and vigilant in the discharge of his duties as a watchman. It is established that after looking in all directions, and in circumstances which show his unapprehensiveness of danger, he deliberately gave the white lamp proceed signal to the car which was at the foot of the incline; and that almost at once after the car had started he (Pettit), showing signs of distress, moved about, quickly moving his lamp in a manner which was not understood at the time, but which subsequent events showed he meant as a danger signal and reverse order.

It seems to me that there is no other conclusion to reach but that it was at the same moment, although he had just been looking westerly as well as in other directions, that he first caught sight of the train backing up onto the crossing.

Dowdle, who claims he was on the end car with a lamp, says that as he was approaching the bridge he whistled out with his fingers to Pettit and that the latter came forward with a red lantern and gave him the proceed signal by waving the same in a circle. I absolutely disbelieve this. This man's manner of giving evidence and his general behaviour were not at all satisfactory to me. But the main consideration is that his contention is altogether inadmissible in the light of that part of the evidence with respect to Pettit's signalling

the street car, which was so firmly and abundantly established, unless it be held that Pettit was suddenly stricken with insanity or seized with a murderous impulse, which there is surely no ground for assuming.

There were eleven witnesses, who at different phases, but most of them simultaneously and throughout, followed Pettit's course of action, and their evidence covers the full range of possible events in such a way as to leave no room for admitting such signalling as Dowdle says was given to him. The nearest approach to corroboration of Dowdle's testimony was by Miss Kasler, who says that when she passed the crossing with Mr. and Miss Leslie, Pettit was there, having in his left hand a red lamp and a white lamp.

What appears to have happened is this: Pettit, having looked from the west side of the bridge in the direction of the C.N.R. track, as Miss Kasler said he did, and found everything in order on that side as he thought, proceeded towards the shanty where he probably put on the ground the red light. He then gave to the street car the white pass signal. Then, becoming suddenly aware of the approach of the train, he tried, by waving the white light right and left, to reverse his pass order to the car. What followed exactly must be greatly a matter of surmise. He probably conceived at that moment the idea of signalling to the train as well. It was probably with that end in view that he rushed towards the signal house as he was seen to do. There he probably grasped the red light and had perhaps begun to wave it, possibly in an agitated and disordered manner, when the collision took place and the car was pushed over and fell on him, smashing at the same time the red lamp, which was later found at that spot. There is no reason to believe that Dowdle, wherever he may have been then, could have seen any waving of the red light by Pettit, except at the moment, at the place and in the manner just stated.

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With respect to the defendants' contention that, inasmuch as the street car only slowed up and did not exactly stop at the foot of the incline, as it should have done under the Railway Commissioners' order, the Street Railway Company were the cause or one of the causes of the accident, I would say that, even if they were a factor in the event, the case would come within the decisions *In re Bernina*, 13 A.C. 1, and *Burrows v. March Gas & Coke Co.*, L.R. 5 Ex. 67.

In my opinion the plaintiff is entitled to recover under the statute and I assess the damages at \$5,000.

There will be judgment for the plaintiff for the amount stated with costs.

Defendants appealed.

*O. H. Clark, K.C.*, for defendants, appellants, cited *Turnbull v. Corbett*, 8 D.L.R. 343; *Coghlan v. Cumberland*, [1898] 1 Ch. 704; *Lamond v. G.T.R.*, 16 O.L.R. 365; *McMullin v. Nova Scotia Steel & Coal Co.*, 39 S.C.R. 593; *Groves v. Wimborne*, [1898] 2 Q.B. 419; *Strottman v. St. Louis*, 109 S.W.R. 769, and *Butler v. Fife*, [1912] A.C. 151.

*W. H. Trueman* for plaintiff, respondent, cited *White v. Victoria Lumber Co.*, 14 B.C.R., 378, [1910] A.C. 606; *Rowley v. L. & N.W.Ry. Co.*, L.R. 8 Ex. 221; *Davidson v. Stuart*, 14 M.R. 74; *Swainson v. N.E.Ry. Co.*, 3 Ex. D. 341, and *Pattison v. C.P.R.*, 26 O.L.R. 410.

The judgment of the Court was delivered by

HOWELL, C.J.M. The judgment of the learned trial Judge should not be disturbed except as to the amount of the damages, and the matter was reserved solely upon this branch of the case.

The action is for damages under the Manitoba Act for Compensation to Families of Persons killed by Accident, R.S.M. 1902, c. 31. This Act is practically a copy of the English Act known as Lord Campbell's Act.

The action being only for the purpose of making good to the survivors the financial loss sustained by them because of the death of the bread winner, the physical and mental suffering of the deceased is not a factor to be considered. It might well be urged that the suffering or sorrow of a dependent wife should be considered and a solatium allowed her in estimating her loss; but under the English Act this question has been disposed of adversely to the plaintiff in the case of *Blake v. Midland*, 18 Q.B. 93. It is there held that the damages must be limited to the pecuniary loss sustained because of the death, and at page 112 the following language is used: "They (the jury) could not take into their consideration the mental sufferings of the plaintiff for the loss of her husband." *Seven on Negligence* at 185 refers to this case as the English law at the present day. Our Province has practically copied this Act, and we therefore take it subject to the judicial decisions upon it given in England: *Trimble v. Hill*, 5 A.C. 342.

The English Act in practically the same language was enacted in the Province of Quebec, and in an action under it the Supreme Court in *C.P.R. v. Robinson*, 14 S.C.R. 105, applied the rule as to assessment of damages laid down in *Blake v. Midland*.

It seems to me clear that in this action the plaintiff's damages must be limited to her actual financial loss from the death of her husband. She was at the death 54 years old, and he was about 65, was earning \$45 per month and was apparently a strong, healthy man, practically never ill. There was no evidence as to the probable duration of the life of this strong, healthy man of 65 as there was in *Rowley v. London*, L.R. 8 Ex. 221, and as I assume there was in *Lamond v. G.T.R.*, 16 O.L.R. 365. In this last case the following language is used:

"I have only to assess the damages to which the plaintiff is entitled. The deceased was sixty-five years

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old and his wife sixty-three; his wages were \$1.10 a day. Sundays and holidays included, and his expectation of life was eleven years. Nine hundred dollars seems to me a reasonable sum at which to assess the damages."

With the very greatest respect for this distinguished Judge, I would have been more liberal. The amount he granted was a sum equal to the whole wages for two and a quarter years.

The plaintiff is entitled to her pecuniary loss, that is a sum that will give her the physical comfort which she had at the time of her husband's death out of his labor and earnings to be continued during the expectancy of life, subject to the accidents of health and of employment. I will venture to say that, without the assistance, protection and society of her husband, she could not purchase the same comforts for less than it cost the two to live together. If the husband had been in life merely her watch dog and if that was a pecuniary advantage for her, then why not damages for this loss?

I fully realize all the difficulties referred to by many eminent Judges in the past as to the assessment of damages in such cases as this; but the difficulties must be faced. These two people lived together in holy partnership for more than 20 years, and I shall assume that each comforted, assisted and protected the other, and incidentally the money which he brought into the partnership still further assisted in the battle of life. In my view of the matter something beyond mere mortality tables and actual earnings may be considered.

Putting myself in the position of a jury in this case, and without giving further reasons, I would assess the damages at \$3,000 and in this respect I differ from the learned trial Judge. I cannot find evidence that would justify the assessment of \$5,000. It is not a question of demeanour of witnesses but conclusions to be drawn from undisputed facts. Perhaps the sorrow and sufferings of



the plaintiff was an element considered in finding that amount.

The judgment against the defendants will be reduced to \$3,000 and there will be no costs of this appeal.

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NORTHERN ELECTRIC & MFG. CO.

v.

THE CITY OF WINNIPEG.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*Agreement to refer to arbitration—Stay of proceedings—Arbitration Act, 1911, s. 6—Referee in Chambers, jurisdiction of—King's Bench Act, Rules 27 and 29.*

The plaintiffs contracted with the defendants to supply a turbine pump and other machinery for the equipment of a well. The contract provided that, "Should any question arise respecting the true construction or meaning of the specifications, or should any dispute arise from any cause whatever during the continuance of this contract, the same shall be referred to the award, order and determination of the City Engineer, whose award shall be binding and conclusive."

The plaintiffs claimed that they had supplied the machinery in accordance with the contract and sued for the amount payable under it and for many additional items in connection with the work.

Before pleading, the defendants moved under section 6 of the Arbitration Act, 1911, for a stay of proceedings pending a reference to the City Engineer as provided for in the contract. In answer to the motion the plaintiffs relied on the allegations in their statement of claim as showing reasons why the action should be allowed to proceed, but they filed no affidavits as evidence to show that anything not arising directly under the contract would have to be considered or that the City Engineer might have to be a witness, or that anything he might have to say, or even that any views he might have formed, would be contradicted by testimony of any kind, or that he would, for any cause, be considered disqualified to act as an arbitrator.

*Held*, reversing the decision of MACDONALD, J., that the proceedings should be stayed as asked for by the defendants. If there was any reason why the matters should not be referred to arbitration, it was the duty of the plaintiffs to bring it forward and present it to the Judge.

*Bristol v. Aird*, [1913] A.C. 241, and *Hodgson v. Railway Passengers Assurance Co.*, (1882) 9 Q.B.D. at p. 191, followed.

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The mere allegations in the statement of claim are not sufficient proof of the existence of such a reason.

The filing of a statement of defence was not necessary to the "arising" of a "question" or a "dispute" between the parties, especially as the defendants could only apply under the statute before pleading.

The expression "should any dispute arise from any cause whatever during the continuance of this contract" is most comprehensive and should be read as meaning "all disputes that may arise between the parties in consequence of this contract having been entered into."

The completion of the work by the plaintiffs, as alleged, would not put an end to the contract, which would "continue" until all payments under it had been made, so that the disputes arose "during the continuance of the contract."

That the defendants' Engineer would naturally be biased in favor of the City is no sufficient reason for refusing to give effect to the express agreement of the plaintiffs who knowingly entered into it.

*In re Hohenzollern, &c.*, (1886), 54 L.T.N.S. at p. 597; *Willesford v. Watson*, (1873), L.R. 8 Ch. 473; *Ives v. Willans*, (1894) 63 L.J. Ch. 521, and *Jackson v. Barry Ry. Co.*, [1893] 1 Ch. 238, followed.

*Freeman & Sons v. Chester*, [1911] 1 K.B. 783, distinguished.

*Per* MACDONALD, J. The Referee had jurisdiction, under Rule 29 of the King's Bench Act, to make the order asked for.

DECIDED: 9th June, 1913.

**Statement.** ACTION upon a written agreement between the parties to this suit entered into on or about the 30th of March, 1909, under which the plaintiffs were to supply and install a turbine pump and certain other machinery for the equipment of what was called Well No. 7 in the City of Winnipeg. The plaintiffs stated that they supplied the machinery and they claimed a large sum still owing them. They stated they were prevented by delays and default, for which they were not responsible, from proceeding with the work. They made a claim for many additional items in connection with the work which they alleged the defendants should pay, the total amount of which was \$20,671.67.

The agreement contained a provision for referring disputes to the City Engineer, which is set out *verbatim* in the judgment of Haggart, J.A.

On the suit being brought a motion was made before the Referee to stay proceedings under the submission

clause and chapter 1, section 6, Manitoba Statutes, 1911, known as The Arbitration Act. The Referee refused the order, holding that he had no jurisdiction. On appeal to Macdonald, J., the order to stay was again refused on the ground that the claims sued for did not come within the terms of the arbitration clause in the contract.

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Defendants appealed, seeking to have the Judge's order set aside and an order made staying all proceedings in the action.

The following judgment on the appeal was given by

MACDONALD, J. The plaintiffs entered into a contract in writing with the defendants to supply and install one turbine pump and one three phase 60 cycle induction motor, together with shafting, etc., for which the defendants were to pay the sum of eleven thousand dollars.

This contract provides that, should any question arise respecting the true construction or meaning of the specifications or should any dispute arise from any cause whatever during the continuance of this contract, the same shall be referred to the award, order and determination of the City Engineer, whose award shall be final and conclusive.

Certain other provisions are made in Schedule "H" annexed to and forming part of the contract, constituting the City Engineer sole judge and arbitrator, but not affecting the matter to be determined here.

The plaintiffs bring this action, alleging completion of the works and acceptance thereof, and claiming payment due and payable under the contract, and also claiming for certain other services not covered or provided for by the contract.

The defendants, upon service upon them of the statement of claim, made a motion before the Referee for a stay of proceedings in the action, taking the stand that the arbitration clause in the contract provides the tribunal before which all matters in dispute are to be adjusted.

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Section 6 of the Arbitration Act provides for applying for a stay of proceedings and that the Court or a Judge thereof may make such an order.

Under Rule 27 of The King's Bench Act the Referee in Chambers is empowered to do all such things, etc., as are *now* done by a Judge sitting in Chambers, with certain specified exceptions, of which this is not one.

This application being subsequent to the passing of that Rule, the Referee would not have jurisdiction were it not for Rule 29 of The King's Bench Act, which amplifies the powers under Rule 27, and makes it applicable to future as well as to past actions and matters in Court.

Counsel engaged in the case before the Referee, however, it appears, relied solely on section 6 of the Arbitration Act, and confined their argument to that section. The notice of motion was for an order under section 6 of The Arbitration Act, 1911, and under this the learned Referee declined to exercise jurisdiction.

The intention of counsel for the defendant no doubt was to secure a stay of proceedings and the appeal from the Referee is based on Rule 29 of the King's Bench Act referred to, which rule was not urged before the Referee.

From a perusal of the statement of claim and the contract, I am clearly of the opinion that the subject matter of the action is not within the arbitration clause of the contract, and I will, therefore, make an order dismissing the application.

Costs in the cause.

Defendants appealed.

*T. A. Hunt, K.C., and J. Preudhomme* for defendants, appellants, cited *Ives v. Willans*, 63 L.J.Ch. 521; *Wilkesford v. Watson*, L.R. 8 Ch. 473; *Hodgson v. Ry. Passengers Ass. Co.*, 9 Q.B.D. 188; *Wood v. Governor, etc.*,

of *Copper Mines*, 18 L.J.C.P. 293; *Hudson on Building Contracts*, vol. I. 238, 242, 243, 741; *Pashby v. Birmingham*, 18 C.B. 29; *In re Mclean v. Marcus*, 6 T.L.R. 355; *Wickham v. Harding*, 28 L.J.Ex. 215; *Seligmann v. Boutillier*, L.R. 1 C.P. 681, and *Russell v. Pellegrini*, 26 L.J.Q.B. 75, 6 E. & B. 1020.

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*C. S. Tupper* for plaintiffs, respondents, cited *Pashby v. Birmingham*, 18 C.B. 2; *Russell v. Vand*, 2 Hudson, 439; *Workman v. Belfast*, L.R. Ir., [1899] Q.B. 242; *Moyers v. Soady*, 18 Ir. L.R. 499; and *Turncock v. Sartoris*, 43 Ch. D. 150.

RICHARDS, J.A. The law is definitely laid down for us in *Bristol v. Aird*, [1913] A.C. 241. As I read the judgments in that case, they, in effect, confirm the view taken by Sir George Jessel, M.R., in *Hodgson v. Railway Passengers Assurance Co.*, 9 Q.B.D. at p. 191, where he says:

"I have always acted on the simple rule that where a party applying cannot adduce a reason in support of his application the Judge may be satisfied that no reason exists. *The plaintiffs here are in the position of a party applying*, and if there is any reason why the matter should not be referred to arbitration, *it is their duty to bring it forward and present it to the Judge*, and if they cannot do so the Judge is quite justified in being satisfied that there is no reason."

In *Bristol v. Aird*, and other cases quoted to us, the parties who successfully opposed the motion to stay the action gave, in answer to the application, proofs by affidavit, of the genuineness of their contentions, showing the facts they relied on as grounds for refusing the motion.

What has the plaintiff done in the present case, to shew why the action should not be stayed? No affidavits have been filed, or proofs given by him. He has not shewn that anything whatever will have to be considered that does not arise directly under the contract. There is no-

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thing to shew that the City Engineer may have to give evidence, or that anything he may have to say, or even that any views he may have formed, will be contradicted by testimony of any kind, or that he should, for any cause, be considered disqualified. In the absence of such proofs, it seems to me that we must assume, for the purpose of this appeal, that none can be given.

The plaintiff relies on the mere allegations in his statement of claim. If they are to be taken as evidences of his contention, then no contractor need ever be bound by the arbitration clause. He has only to take care that his statement of claim shall contain allegations which, if proved, would shew a case for the exercise of a judicial discretion to not order the stay of proceedings. He could then, at the trial, simply abandon those parts of his pleading. They would have served his purpose by getting him freed from his contractual obligation to submit to a reference, and it would then be too late to stay the action. because of that obligation.

The argument that these allegations should be assumed to be true as the defendants have not pleaded in denial, has no weight. If the defendants were to so plead, they would, by so doing, be held to recognize the plaintiff's right to maintain the action, notwithstanding the arbitration clause in the contract. Section 6 of the Arbitration Act, 1911, under which the defendants applied for the stay, only gives power to apply "before delivering any pleadings or taking any other step in the proceedings."

It is hard to see how a reference clause could be more general, or sweeping, than the one before us is. It provides for the reference to the City Engineer, "should any dispute arise from any cause whatever during the continuance of this contract." The contention that the part so quoted is limited by the preceding words referring to the "construction or meaning of the specifications" seems

to me untenable in view of the wording of the paragraph containing them.

With the utmost respect, I think there was nothing adduced before the learned Referee, or the learned Judge from whose decision this appeal is taken, to satisfy the onus that was on the plaintiff to shew why the matters in dispute should not be the subject of a reference under the clause in the contract.

I would allow the appeal and set aside the orders appealed against, and direct a stay of proceedings in the action.

Costs of the appeal to be costs in the cause.

CAMERON, J.A. The arbitration clause in the contract here in question is as follows:

"10. Should any question arise respecting the true construction or meaning of the specifications, or should any dispute arise from any cause whatever during the continuance of this contract, the same shall be referred to the award, order and determination of the City Engineer, whose award shall be binding and conclusive."

It is argued that we should read the words, "with reference to the specifications," after the word "whatever."

But I can see no warrant for this. Nor does it seem to me that the words, "during the continuance of this contract," have the effect of narrowing the meaning of the words preceding so as to exclude any of the causes of action set out in the statement of claim. This action is brought on the contract set out in the pleadings which has not been performed by payment by the City, and it cannot be said to be concluded. The second part of the clause appears to be as wide as words can make it, so that it may and does include disputes of every kind arising between the parties until the contract has been finally completed by performance. These disputes cannot, however, relate to matters having no relation to the contract. In *Re Hohenzollern Actien Gesellschaft and the City of*

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*London*, 54 L.T. 596, the clause there in question read: "All disputes are to be settled by the Engineer to the purchaser and the Engineer to be appointed by the vendors or their umpire in case of difference," etc. It was held by Lord Esher, in the Court of Appeal, that these words are to be read as if they were "All disputes that may arise between the parties in consequence of this contract having been entered into." "I think that, there being all these clauses in the contract as to any of which a dispute might arise, this last clause was added to settle them all. I agree with what my brother Lopes has said, that a dispute as to the construction of the contract is within the clause. The question, therefore, comes to be, was this a dispute in consequence of the contract having been made?"

I would say, therefore, that this arbitration clause before us must be read to mean: "Should any dispute whatever arise by reason of this contract having been entered into and during its continuance." The question, therefore, to be asked is: Could any of these matters of dispute have arisen except by reason of the contract having been made? Upon consideration, the answer to this question appears to me that they could not. The matters referred to as not coming directly within the contract cannot be said to have had no relation to it. On the contrary, it can be said that, had it not been for the contract, they would not have come into existence at all.

The functions given the City Engineer, as engineer on construction, and as arbitrator, are a valuable and vital factor in the consideration forming the basis of the contract as regarded from the standpoint of the City. This view is dwelt upon with much force and point in the judgments in *Bristol Corporation v. Aird*, [1913] A.C. 241. The Courts must have good reason shown why such parts of the contract should not be strictly performed, p. 257.

If the tribunal so agreed upon is unfair in its con-



stitution, the parties are estopped from setting that up. But there may be something in the arbitrator that makes him an unfit person to be judge. But this must be considered by the Court "with a strong bias \* \* \* in favor of maintaining the special bargain between the parties." The burden is on the plaintiff of establishing this, and that burden has not been discharged in this case.

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I concur in the judgments of Mr. Justice Richards and Mr. Justice Haggart, which I have read.

HAGGART, J.A. The question arises in this suit, does the cause of action set out in the statement of claim come within the arbitration clause or agreement to refer contained in the contract?

The contract does not consist simply of the paper dated the 30th day of March, 1909, and signed and sealed by the parties to this suit. In express terms it states there is to be read as a part of the contract some eight documents, amongst which is a paper called General Conditions.

Clause 10 of the contract reads as follows:

"10. Should any question arise respecting the true construction or meaning of the specifications, or should any dispute arise from any cause whatever during the continuance of this contract, the same shall be referred to the award, order and determination of the City Engineer, whose award shall be final and conclusive."

With the foregoing is to be read the following clauses in the General Conditions; and, because of the variety of claims set forth by the plaintiff in its statement of claim, I will cite freely from the Conditions with a view of ascertaining whether every item sued for is within the contemplation of the contract.

"2. No extra work is to be undertaken by the contractor unless on the written order of the Engineer, and no claim for such extra work will be recognized unless such order has been made; nor will any extra whatever

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be allowed unless it is claimed in writing from the Engineer within one month from the time of execution of said work claimed as an extra, and unless, also, such claim is accompanied with the written order of the Engineer aforesaid."

"9. From the commencement of the works by the Contractor until full and final completion is certified to by the Engineer, the works shall remain in charge of the Contractor, and he shall at his own cost and risk maintain them, and, making good all casualties and imperfections, hand over everything in good order to the said Mayor and Council without any extra charge."

"13. The prices in the schedule, hereto attached, shall include the supply of all labor, pumps, tackle and all other plant and material (except when these materials are specially mentioned as being provided), the cost of temporary work, and all risks and contingencies whatever, connected with their respective items, and no claim for any extra payment beyond the amount arrived at by measuring up the net amount of work and pricing out the same in accordance with the schedule, will be admitted under any circumstances."

"15. The whole of the works included in the specifications, and the contract, are to be executed to the satisfaction of the Engineer, and in accordance with the drawings and directions furnished by him from time to time. He is to be sole judge and arbitrator as to the mode in which the work is to be carried out—whether the Contractor is making satisfactory progress in view of the time for completion, the sufficiency, quality and quantity of the work done or materials furnished, and also of all questions that may arise as to the meaning or interpretation of the specifications and plans, and every other matter or thing incident to, bearing upon or arising out of these specifications and the contract."

"18. The decision and award of the Engineer upon all matters arising out of the contract shall be absolutely final, binding and conclusive, as between the Contractor, the Sureties and the Mayor and Council of the City of Winnipeg."

"24. The Contractor shall not have any claim or demand against the City by reason of any delay on the part of the City, or its Engineer or other officers."

"28. Should any special kind of work; not enumerated in the schedule, be found necessary in the execution of the contract, the price of the same shall be mutually agreed upon by the Contractor and the Mayor and Council of the City of Winnipeg; failing such an agreement the Engineer shall fix the price, and if this is not agreeable to the Contractor, the Mayor and Council of the City of Winnipeg shall then be at liberty to give the work in question to other parties, and no claim against the City of Winnipeg shall be made by the Contractor for such action, or any consequences thereof whatever."

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As to the contention of the plaintiffs that the plaintiffs' claim is not within the reference provisions of the contract, I would note that clause 10 in the contract provides that, on the happening of either of two events, there shall be a reference; (1) "should any question arise respecting the true construction or meaning of the specifications," or (2) "should any dispute arise from any cause whatever during the continuance of this contract," then the same (*i.e.* the meaning of the specifications or the dispute) shall be referred to the City Engineer. The words, "Should any dispute arise from any cause whatever," are comprehensive, but the plaintiff claims that this dispute did not arise during the contract. They say the contract is finished. The work contracted for may be completed, but surely the paying for that work is a part of the contract.

General Condition 15 read into clause 10 of the contract makes it wider, if possible to do so. Eliminating words that are not actually necessary, it reads: "He (the City Engineer) is to be the sole judge and arbitrator as to \* \* \* every other matter or thing incidental to, bearing upon, or arising out of, these specifications and the contract."

The comprehensive nature of these clauses called conditions seems to contemplate every thing that was done or

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J.A. It is a little difficult to reconcile the many decisions that have been given under the reference clauses in partnership deeds, insurance policies and building contracts. I think the observations of Lord Esher, M.R., in *Re Hohenzollern*, etc., 54 L.T., on page 597, are instructive in the present case. After setting out the nature of the contract and the submission clause, he proceeds to say:

"Now of course all disputes cannot mean disputes that have no relation at all to the contract. But I think that those words are to be read as if they were 'All disputes that may arise between the parties in consequence of this contract having been entered into.' I think that, as my brother Matthew pointed out in the Court below, there being all these clauses in the contract as to any of which a dispute might arise, this last clause was added to settle them all. I agree with what my brother Lopes has said that a dispute as to the construction of the contract is within the clause. The question therefore comes to be, was this a dispute in consequence of the contract having been made."

The plaintiffs contend that on the record there is no evidence of a "dispute" between the parties. It is true that the defendants have not traversed the allegations in the statement of claim. They could not do so by a defence without waiving their rights under the submission clause and the Arbitration Act. Surely the papers show a demand by the plaintiffs by the issue of process, and a refusal to comply with that demand. This application is the first step in a defence. I think we may infer the existence of a "dispute." In any event a supplementary affidavit would be allowed if necessary to prove that fact.

Again, I can understand the plaintiffs vigorously opposing the removal of the case to the tribunal mentioned in the contract. They may say with a good deal of force, although this is a suit between the Contractors and the City, it is really a difference or a dispute between the

plaintiffs and the City Engineer. - He, or his department, no doubt prepared the plans and specifications, and suggested the general conditions. The plaintiffs may say that he has supervised the work, given his directions, made his inspection, has reported to the City, has formed his opinion and has already pre-judged the questions he has to try; further that he would naturally be biased in favor of the City in whose service he is engaged, and that he is to be the sole judge in a quarrel which he may have partly provoked himself; and I am free to say that, if this were an application to appoint some one as an arbitrator, the Court, in its discretion, would endeavor to nominate an independent, competent, disinterested person not connected with either party.

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But in this case, with all these matters present to the minds of the contracting parties, knowing full well what might be the consequences, they create their tribunal, a domestic forum, and deliberately appoint their judge. It is not open to any of the parties to object to his competency for any of the above reasons, and no grounds of disqualification have been set up. I have no doubt that the plaintiffs would not have got the work unless they submitted to this submission agreement. It would be present to the minds of the parties that the person who had charge of the work from its inception could with little trouble and expense adjudicate upon differences while time and costs would be consumed in an ordinary suit, and that engineers holding responsible positions are high class men. It is customary for large corporations to protect themselves in this way and contractors submit to it.

The plaintiffs having chosen to put themselves in this position, they cannot complain of the consequences. It was the intention of both parties that the disputes should be adjusted by the City Engineer, and I read the contract as fully expressing that intention.

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In *Willesford v. Watson*, L.R. 8 Ch. 473, in a lease of a mine there was a clause to refer disputes to arbitrators pursuant to the provisions of the Common Law Procedure Act, 1854, section 11 of which is the original of section 6 of our Arbitration Act, and it was held on construction of the lease that the Court would not decide, but would leave it to the arbitrators to decide whether the matters in dispute were within the agreement to refer. Lord Selborne on p. 471 says, in speaking of the agreement and the position of the parties:

"All the parties to this lease are bound by the agreement to refer, so far as such an agreement by law can bind them. Then what is it they are to refer to arbitration? It struck me throughout that the endeavor of the appellants has been to require the Court to do the very thing which the arbitrators ought to do; that is to say, to look into the whole matter, to construe the instrument and to decide whether the thing which is complained of is inside or outside of the agreement. The plaintiffs in fact ask the Court to limit the arbitrators' power to those things which are determined by the Court to be within the agreement."

p. 478. "In most of such cases the real question between the parties is whether the matter in dispute is within or without the agreement."

p. 480. "The parties have made that agreement, they probably knew what were the reasons in favor of determining these questions by arbitration and what were the reasons against it, and they made it part of their mutual contract that these questions should be so determined. The plaintiffs cannot, therefore, be now heard to complain if that part of their contract is carried into effect."

In *Ives v. Willans*, 63 L.J.N.S. (Ch) 521, part of the claim sued for was within the submission clause and it was admitted that a portion was not within it, the Court ordered a stay as to the portion within the reference and allowed the action to continue as to the rest of the claim. It was also held that a contractor who has agreed to submit disputes arising on the contract to the arbitration of the employer's engineer cannot afterwards

object to the competency of the arbitrator on the mere ground that he has already given his opinion as engineer with respect to matters which he is called on to arbitrate, that state of things being necessarily within the contemplation of the parties at the time of the agreement. *Jackson v. Barry Ry. Co.*, [1893] 1 Ch. 238, was followed and the reasons of Bowen, L.J., cited and approved. See *Walmsley v. White*, 67 L.T. 433.

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In *Vaudrey v. Simpson*, [1896] 1 Ch. 166, it was held that, where articles of partnership contain a clause referring all matters in difference between partners to arbitrators, the arbitrator has power to decide whether a partnership shall be dissolved and to award a dissolution, though the Judge has full power to determine, on a motion to stay proceedings under the Arbitration Act, whether the matters in dispute shall be tried out in the action or referred to arbitration.

It is correct, as the plaintiffs contend, that the Appeal Court will not interfere with the exercise of the discretion of the Judge in the Court below, if it is exercised judicially, according to well-known and ordinary principles; but here, I understand the reason given by the Judge for the disposition he made of the application was that he "was clearly of the opinion that the subject matter of the action is not within the arbitration clause of the contract," from which finding, with all due respect, I dissent.

Now, as to section 6 of chapter 1, Statutes of Manitoba, 1911. This is a re-production of section 11 of the Common Law Procedure Act, 1854, and practically a copy of the corresponding section in the English Arbitration Act, under which this application is made. It is to be observed that the onus is upon the plaintiffs to show some valid reason why this Court should retain the jurisdiction and refuse to allow it to go before the tribunal chosen by the parties. I think the observations of Jessel,

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M.R., in *Hodgson v. Railway Pass. Assce. Co.*, 9 Q.B.D. 188, are applicable here. That was an action on a policy. In the Act of Incorporation there was a provision for referring suits to arbitration similar to section 6 of our Arbitration Act. It was held there that the burden was on the plaintiffs. The Master of the Rolls, at p. 190, says:

"The only question here is whether the Court is satisfied that no sufficient reason exists why the matters in dispute cannot be referred to arbitration. No reason has been adduced why they should not. I have always acted on the simple rule that where a party applying cannot adduce a reason in support of his application the Judge may be satisfied that no reason exists. The plaintiffs here are in the position of a party applying and, if there is any reason why the matter should not be referred to arbitration, it is their duty to bring it forward and present it to the Judge and, if they cannot do so, the Judge is quite justified in finding that there is no reason."

Since the argument and after I had written the foregoing, Mr. Tupper has submitted two additional authorities.

*Freeman & Sons v. Chester*, [1911] 1 K.B. 783. A discretion had already been exercised by the Master and affirmed on appeal to a Judge. The conduct of the Engineer was directly challenged. There was a controversy between the Engineer and Contractor. There were statements and denials. It was contended that the Engineer ought to be precluded by his own admissions from asserting that the works had not been completed to his satisfaction. Both Judges held that they would not interfere with the discretion already exercised; but Cozens Hardy, M.R., said: "It is clear that *prima facie* the Court would give effect to such an agreement," and Buckley, L.J., intimates that, if the matter had been for his judgment alone, he would have made an order to stay proceedings. He affirmed the principles laid down in *Jackson v. Barry Ry. Co.* and *Ives v. Willans*.



In discussing the question as to what disqualifies an arbitrator, Buckley, L.J., says:

"I so entirely agree with the robust good sense of Bowen, L.J.'s language in *Jackson v. Barry Ry. Co.* \* \* \* I cannot find that Mr. Priest had done anything to unfit himself to act or render himself incapable of acting, not as an arbitrator without previously formed or even strong views, but as an honest judge of this very special and exceptional kind. To succeed the contractors must, in the language of Lindley, J., in *Ires v. Willans*, 'attack the character of the engineers to such an extent and in such a manner as to shew that the engineers will probably be guilty of some misconduct in the matter of the arbitration: that they will not act fairly.'"

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The other authority submitted is the recent case of *Bristol Corp. v. Aird*, [1913] A.C. 241.

It was contended that the Engineer would be necessarily placed in the position of a judge and witness.

During the progress of a very large work, extending over a number of years, some subsequent verbal arrangements were made between the Engineer and the Contractors as to certain changes in the material and portions of the work. The contractor claimed that certain substituted materials should be used and measurements should be made by another method than what was agreed upon in the original agreement. The engineer disputed this; therefore, right on the threshold of the enquiry was the question as to what these arrangements were, and that could only be ascertained from the oral evidence of the engineer and contractor. It was held that the engineer was placed in an anomalous and embarrassing position. Every one of the Judges, in the strongest terms, affirmed the principle of giving effect to the reference provisions of the contract, and pointed out the benefits to arise from the use of the domestic tribunal.

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Lord Atkinson, on p. 249, says: "I am as fully conscious as anybody can be of the great objection to referring such matters as these to the ordinary tribunal of a Judge and jury, or a Judge sitting alone, to decide. It would be expensive and it cannot be supposed that a Judge, or a Judge and jury, could bring to the decision of such questions the trained experience and knowledge of a man in the position of Mr. Squire (the engineer)."

And Lord Shaw, on p. 251, says:

"When parties have agreed that the undertaker's engineer, whose judgment on details such as additions, alterations, measurements, etc., may of course have to be indicated in the course or at the conclusion of the contract, is nevertheless to be arbitrator, then by that contract the parties stand bound. For the arbitrator is thus accepted by them as one who will be so guided by the dictates of justice and professional honour as to put aside the bias which is natural in favour of all his own preconceived opinions, and to act judicially."

And Lord Moulton, on p. 259, says:

"I think that one of the reasons why he is chosen is that he has a personal knowledge of the circumstances of the work and, although there may be differences of recollection with regard to things which have occurred during the course of the execution, his personal acquaintance with the facts will in no wise hinder his being a good arbitrator, if he is an honest man."

Here, Mr. Ruttan's conduct is not challenged. His competency is not questioned. If we should refuse the order to stay in the present case, it would be tantamount to making the almost universal arbitration clause nugatory unless both parties consented; because in all such cases it could be suggested that he had already formed an opinion, or would likely be biased in favour of the corporation whose officer he was, or that he might be a necessary witness. Here, on the record before us, there is not even a hint that he does not possess all the qualifications of a competent arbitrator.

Any man of the standing of engineers for large insti-

tutions and holding positions of responsibility, though afflicted with the usual human infirmities, cannot afford to do other than act fairly between the parties who appointed him their judge.

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I would allow the appeal and make the order to stay proceedings asked for by the defendants. Costs to be costs in the cause.

HOWELL, C.J.M., and PERDUE, J.A., concurred.

*Appeal allowed.*

## COLONIAL ASSURANCE CO. V. SMITH.

Before CURRAN, J.

*Company — Promoters' shares — Ultra vires — Illegality — Shareholders suing in name of company — Payment of dividends out of capital — Parties to action — King's Bench Act, Rule 345.*

The following acts and transactions on the part of the defendants William Smith and his wife, the plaintiff Company and other persons who had been shareholders and directors of the Company were held to be *ultra vires* of the Company, illegal and fraudulent as against the Company and its shareholders and declared void:—

1. The issue in 1905 of \$25,000 of fully paid up stock, called series A, to the defendants and others, promoters of the Company, when nothing had been paid on the shares and the alleged consideration for the issue, viz: "compensation for organizing the Company, costs of obtaining the charter, procuring amendments thereto and for all services and expenses of and incidental thereto," was found to be unsubstantial and illusory.
2. The issue at the same time to the same parties of certificates for \$25,000 of stock, called series B, showing payment of the first call of 15 per cent thereon without any actual payment in cash or otherwise to the Company by any of the parties.
3. The declaration of several large dividends on both series of stock in impairment of capital, and the application of those dividends by cross entries in the books of the Company from time to time so as to make it appear that successive calls of sixty per cent in all had been paid on their shares by the holders of series B stock, when in fact no money had ever been actually paid by them thereon, and the issue of certificates from time to time showing payment of such calls.
4. The declaration, in 1910, of a dividend of 20 per cent on the par value of the series A shares, \$25,000, and the payment of that dividend

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to the defendant William Smith who was, and had been from the first, the president and manager of the Company and who had in the meantime acquired from the other promoters all their shares in both series, with full knowledge of all the circumstances.

5. A resolution of the directors passed in 1911 and confirmed at a meeting of shareholders, that the Company should pay out of its funds to William Smith \$9000 in consideration of his surrendering and cancelling to the Company all the certificates for the 250 shares of series A fully paid up, of the par value of \$25,000, which he had acquired as above mentioned, and the payment to Smith of the said sum of \$9000 in accordance with that resolution, because, (a) the shares of series A had not been validly issued and, (b) the transaction amounted to a purchase by the Company of its own shares, which was illegal and could not be ratified, sanctioned or authorized by the shareholders either by a majority or by the whole body acting in concert.

*Trevor v. Whitworth*, (1887) 12 A.C. 409; *Re Jones and Moore Electric Co.*, (1909) 18 M.R. 549; *Wellon v. Saffery*, [1897] A.C. 299, and *North West Electric Co. v. Walsh*, (1898) 29 S.C.R. 46, followed.

The plaintiffs Simpson and Halpenny had become holders of shares of other series of stock in the Company in ignorance of the facts connected with the issue of the promotion stock, and sued in this action on behalf of themselves and all other shareholders of the Company. They had not obtained the consent of the Company to the use of its name as plaintiff in the action, but the defendants had made no application before the trial to strike out the name of the Company as having been used without authority, nor did they at the trial offer any evidence to show which party, plaintiffs or defendants, really represented the majority of the shareholders.

*Held*, that the individual plaintiffs, being shareholders, had, *prima facie*, the legal right to use the Company's name to redress what were alleged to be wrongs to the Company and to the shareholders other than the defendants, which wrongs a majority could not sanction and to have the transactions which were illegal, fraudulent and *ultra vires* of the Company set aside, and that the objection taken in the statement of defence as to the use of the Company's name as plaintiff should be over-ruled, as there could be no doubt that the proceedings taken were in the Company's interest.

If the objection had been taken before trial and given effect to, the only result, in the circumstances of this case, would be that the Company would have been made a party defendant under Rule 345 of the King's Bench Act, and the action would have gone on at the suit of the individual plaintiffs.

*Dicta* of Wigram, V. C., in *Foss v. Harbottle*, (1842) 2 Hare at 491; Jessel, M.R., in *Russell v. Wakefield*, (1875) L.R. 20 Eq. at page 482, and of Malins, V. C., in *Gray v. Lewis*, (1869) L.R. 8 Eq. at p. 541; *Pender v. Lushington*, (1877) 6 Ch. D. 70, and *Harben v. Phillips*, (1883) 23 Ch. D. 14, followed.

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Judgment in accordance with the above holdings, setting aside the issue of series A stock as void *ab initio*, declaring that the shares in series B are wholly unpaid and that the holders thereof have no right to vote thereon at meetings of shareholders, as the calls thereon had not been paid, and should be enjoined from so voting while in default in payment of calls; rectifying the share register in accordance with the judgment, and requiring the defendants to repay to the Company all dividends paid to them or either of them upon series A or B stock with interest, and the defendant William Smith to repay to the Company the \$9000 received by him for the surrender of the promotion stock, with interest.

Defendants were also enjoined from disposing of or transferring any of said series B stock until all calls were paid.

Defendants to pay all costs with removal, if necessary, of the statutory limitation fixed by 7 & 8 Edw. VII, c. 12, s. 1.

Reference to the Master to ascertain what moneys had been received by the defendants or either of them in respect of the series B stock. Further directions and costs of the reference reserved.

DECIDED: 23rd April, 1913.

THE plaintiffs in this action were the Colonial Assurance Company and R. M. Simpson and J. Halpenny, who sued as well on behalf of themselves as of other shareholders of the Company. The defendants were William Smith and Mary E. Smith, his wife. Statement.

The action was brought to set aside certain allotments of stock and for repayment of moneys received by the defendants.

*G. A. Elliott, K.C.*, and *W. L. McLaws* for plaintiffs.

*A. B. Hudson* and *T. H. Johnson* for defendants.

CURRAN, J. This is an action brought in the name of the Company and of Robert M. Simpson and Jasper Halpenny, shareholders, who sue as well on behalf of themselves as of all other shareholders of the Company, against the defendants, who are also shareholders of the Company and are man and wife. The male defendant is the manager and president of the plaintiff Company.

The Company in question was originally The Manitoba Insurance Association, incorporated by special Act of the Manitoba Legislature in the year 1889, c. 52 of the statutes of that year.

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By section 6 of the Act the capital stock of the Company was fixed at \$250,000, divided into 2,500 shares of \$100 each, "which shares shall be and are hereby vested in the several persons who shall subscribe for the same," etc.

Section 13 provides that the board of directors shall require five per cent of the capital stock subscribed to be paid at the time of subscribing for the same and makes provision for calls on capital stock as required, limited to an amount not greater than ten per cent of the amount subscribed, and provides that three months shall elapse between calls. Provision is also made that the board may by resolution forfeit shares in case the owner shall neglect or refuse to pay any call thereon for three months after the same has become payable.

Section 15 gives the usual power to the directors to administer the affairs of the Company, to regulate the allotment of stock, the making of calls thereon, the payment thereof, the issue and registration of stock certificates, the transfer of stock, the declaring and paying of dividends, etc.

Section 16, which was repealed in the year 1900, empowered the board of directors to appropriate and pay the holders of capital stock, out of the profits, interest not exceeding ten per cent per annum on the amount actually paid in on such stock and, after payment of such interest, to appropriate and pay to such shareholders such amount of the net profits, in such proportions as they shall deem safe and expedient, as dividends or bonuses; but not at any time to exceed four-fifths of such net profits, provided that no such dividend or bonus shall be paid until at least ten per cent of the gross amount of risks carried by the Company shall be set aside and held as a guarantee and reserve fund by the Company.

Section 19 prohibited assignments of stock until all arrears in respect thereof had been fully paid up.

Section 21 prohibited the Company from commencing business until \$50,000 of stock had been *subscribed* and ten per cent therein *actually* paid in and deposited with the Provincial Treasurer in cash or in the stock, debentures or securities of the Government of the Dominion of Canada or of this Province or of any school district thereof.

It is not necessary to notice any other of the provisions of this Act.

Apparently, nothing was done with the charter, and in the year 1900 the defendant William Smith acquired it for the sum of \$100—just how does not appear—and caused a change of name to the Colonial Assurance Company to be made.

At this time there appears to have been associated with the male defendant J. T. Huggard, H. E. Robison and Israel Bennetto, who paid in to him the sum of \$50 each, evidently in connection with the acquisition of the charter.

The male defendant was the manager of The Colonial Investment Company, engaged in the loaning of money upon mortgages of real property. In connection with such mortgages insurance against fire was placed upon the buildings situated upon any mortgage security. This evidently suggested the idea to the defendant William Smith of acquiring this old charter and going into the business of fire insurance himself; but before doing so, however, he decided to give the matter a practical test as to profits, and during the five years between 1900 and 1905 the business of insuring borrowers of the Loan Company against loss by fire was carried on, apparently by the Investment Company through the defendant William Smith. No policies of insurance were issued nor any kind of contract to protect the

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insured, who were, moreover, ignorant of this omission and apparent lack of protection. The premiums for such alleged insurances were collected from the borrowers by the Investment Company and always retained by that Company, and these premiums accumulated during the said period of five years to the sum of \$3,669.15 net. This money, I think, really belonged to the Investment Company, who, during these five years, had virtually become their own insurers. The Assurance Company had not yet been organized and was not in any way responsible for or connected with these alleged insurances. The entries showing the receipts of the various sums of money for premiums of insurance by the Investment Company during this five-year period appear on pages 4 to 27 (both inclusive) of Exhibit 4, which is a cash book of the Investment Company.

Such then was the position of matters in February, 1905, when the defendant William Smith and his associates before named decided to organize the Colonial Assurance Company and commence business. The first meeting of shareholders was held on the 16th of February, 1905, at which Bennetto, Huggard, Robison and the defendants were the only persons present, and such persons were treated as shareholders of the Company, with the usual legal rights in the premises. A code of by-laws was enacted and the same five persons were elected the first directors of the Company.

By by-law 17 of the shareholders, appearing on page 40 of Exhibit 3, which is the minute book of the Company, the directors were required to issue \$50,000 of stock of the Company, of which \$25,000 should be fully paid up. The directors elect held a meeting after the shareholders' meeting had adjourned and proceeded to pass the following resolutions: "That the promoters of the Company be allotted the sum of \$25,000 in fully paid up stock of the Company, such allotment to be as compensation for organizing the Company, costs of



obtaining the charter, procuring the amendments thereto and for all services and expenses of and incidental thereto." At the same meeting the directors passed another resolution, which is as follows: "That the applications of Israel Bennetto, J. T. Huggard, William Smith, H. E. Robison and M. E. Smith for \$5,000 of stock each be accepted and stock so applied for be allotted to each of the said parties and certificates of the same be issued, dated January 1st, 1905; that fifteen per cent. be the first call upon this stock." At the same meeting the directors passed another resolution in the following words: "That the directors borrow from the Colonial Investment Company of Winnipeg the sum of \$1,600 at eight per cent. per annum, interest payable half yearly."

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The promoters of the Company, Bennetto, Huggard, Robison and the two defendants, made application for the issue of promoters' stock in accordance with the first of these resolutions. These applications were put in at the trial as Exhibit 2, are signed by the promoters, and are dated the 16th of January, 1905. In each one the applicant applies for fifty shares of stock of The Colonial Assurance Company, said shares to be fully paid up.

In accordance with these applications and the resolution of the directors before recited, stock certificates, Exhibit 6, for fifty shares each, were issued to each of these parties, stating the said shares to be fully paid up. These shares were known as Series "A" in the Company's dealings, and are so designated in this judgment.

All these shares subsequently were acquired by the defendant William Smith, and were afterwards surrendered by him to the Company for a cash consideration, as will more fully appear hereafter.

In pursuance of the second resolution of the directors, before referred to, written applications for shares were

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made by Bennetto, Huggard and Robison and the two defendants each for fifty shares of stock. These applications are dated January 16, 1905, and were put in at the trial as Exhibit 5, and by them the applicants each applied for fifty shares of stock of The Colonial Assurance Company, "on which a call of fifteen per cent. shall be made, and the balance in accordance with the by-laws of the Company."

Accordingly stock certificates for fifty shares each to these parties were issued, showing fifteen per cent. paid thereon. These certificates were put in at the trial as Exhibit 7, and were known to the Company as Series "B," and are so designated in this judgment.

With regard to Series "A" or promoters' stock, I find as a fact that no money or money's worth whatever was paid by the holders of these shares to the Company as the consideration for the issue of such shares, but that such issue was a gift pure and simple to the recipients. Smith, on his examination for discovery, attempts to give some explanation to the effect that there was a consideration for the issue of this stock, which I think is wholly illusory. He says that he and his associates estimated that the value of the business which had been procured during the five years, the connection formed and the prospects of future business, would be worth \$25,000 to the Assurance Company; and this is the only explanation that he can give. He admits that no money whatever was paid for this stock. Now, from the way in which the alleged insurance business had been carried on during the five years prior to the organization of the Assurance Company, I think that any good will which attached to such business, if there was any, belonged to the Investment Company, and to no one else, and, holding this view, I do not see how this good will could be put forward as a consideration from these promoters to the Assurance Company to

support the issue of this large block of stock; but I will deal with the legal aspect of this later on and proceed to discuss the facts in connection with the issue of Series "B".

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The fifteen per cent. call on Series "B" stock would amount to \$3,750 and, apparently to lend color to the payment of this money by the individuals to whom the stock was issued, namely, Huggard, Bennetto, Robison and the two defendants, certain entries were made in Exhibit 4, a cash book of the Investment Company, on page 34, from which it is made to appear that the sum of \$750 had been received from each of these parties, or was at their credit with the Investment Company. The defendant William Smith was interrogated as to the source from which this money came, and he says it came from the Colonial Investment Company, that no cheques were issued to these parties for the amounts, but that there was merely a transfer made in the books.

The witness Dick, who was the secretary of the plaintiff Company, swore that he did not know where this money came from, that the money was paid in on the 16th of February, 1905, to the Investment Company, in whose custody it has always remained. He further stated that not a penny of this money was ever paid out to the Assurance Company.

I think there can be no doubt that this fund was, to the extent of \$3,669.15, made up of the accumulations before referred to from insurance premiums in the hands of the Investment Company. In fact, Dick says in his evidence that the entire fund which the Assurance Company began with was \$5,469.15, made up of this \$3,669.15 in the hands of the Investment Company, \$200 put in by the promoters and \$1,600 borrowed from the Investment Company; but it must be borne in mind that none of this money ever found its

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way into the treasury of the Assurance Company, but always remained in the custody and under the control of the Investment Company.

I cannot see, therefore, how any part of this fund can be considered as belonging to any of the promoters. To the extent of the accumulations in the hands of the Investment Company, I hold that such money was the property of the Investment Company and was not the property of the Assurance Company or of the promoters.

Now, it is claimed by the defendants that the Assurance Company invested \$5,000 of its funds on January 1st, 1905, in preferred permanent stock of the Investment Company (Exhibit 29), and again another \$5,000 on January 1st, 1906, in the same class of stock of the Investment Company (Exhibit 25), and that both of these investments were repaid by the Investment Company to the Assurance Company on 14th September, 1911, by Exhibit 30. I cannot find that the Assurance Company had \$5,000 of its own funds to invest on January 1st, 1905; no shares were authorized to be sold until February 17th, 1905, and then only 250 shares, on which the directors purported only to call up fifteen per cent., or \$3,750. Even if this call had been paid, which it was not, it would not have produced sufficient capital to make this investment. I think this stock transaction by which Exhibit 29 was issued was wholly fictitious to lend color to the attempt to show that the Assurance Company had received payment of the fifteen per cent. call and that the Series "B" stock was validly issued.

I hold, therefore, as a question of fact, that the fifteen per cent. required to be paid upon Series "B" by the applicants for that stock was never in fact paid, and that the statement in the stock certificates them-

selves that such payment had been made was wholly untrue.

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The next transaction called in question in this suit affecting these shares, both Series "A" and "B," took place on the 14th of February, 1906, at the first annual meeting of the shareholders of the Assurance Company, when the following resolution was passed: "That a dividend of 12½ per cent. be declared upon the subscribed stock of \$50,000, and that cheques for that amount be drawn." Also "That a call of twenty-five per cent. on the subscribed stock of \$25,000, which is not fully paid up, be made, and that the amount of said call be paid within twenty-one days from the date thereof." In accordance with the first of these resolutions cheques for \$1,250 each of the Investment Company, put in as Exhibit 9, were issued to Bennetto, Robison, Huggard, and each of the defendants. These cheques were in payment of the 12½ per cent. dividend on both Series "A" and "B" of the Company's stock. The money to pay this dividend would, in the ordinary course of business, have come out of the Investment Company's bank account, and was not paid by the Assurance Company at all. None of these cheques were, however, cashed by the individuals to whom they were made payable, but were endorsed over to the Assurance Company and further endorsed by it to the Colonial Investment Company, so that the issue of these cheques did not in any way disturb the funds of either Company, and, so far as the Investment Company was concerned, simply resulted in a cross-entry in its bank account. The reason for the cheques being used in this way is to be found in the second of these two resolutions, making a twenty-five per cent. call on Series "B." Out of this dividend this call of twenty-five per cent. was paid, and accordingly, to give color to the transaction, new stock certificates were issued to the promoters for Series "B"

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stock to replace Exhibit 7, the original certificates; such new certificates showing on their face that forty per cent. had been paid by the holders in respect of their shares.

It is contended by the plaintiffs that the payment of this dividend was wholly illegal—firstly, because no reserve fund had been provided for as required by section 16 of the Company's Act of Incorporation. Smith, in his examination for discovery, expressly admits this fact; secondly, because at that time there were no profits out of which such a dividend could be declared, and that it was of necessity paid out of capital. I agree with both of these contentions.

The call of twenty-five per cent. was illegal as being in excess of what was permitted by the Act of Incorporation and, furthermore, I am of opinion that the payment of this dividend to these parties was illegal because their stock was then in arrears in respect of the first call of fifteen per cent., which I hold had not been paid, and which was required to be paid by the resolution of February 17th, 1905, and, even if the Assurance Company was then in a position legally to pay a dividend of this amount, these parties, being in arrears, in respect of their stock, had no right to receive any dividends nor had the Company any right to pay them any dividends.

No further dividends were paid until the year 1910. During this interval the defendant William Smith appears to have acquired all the shares held by Bennetto, Huggard and Robison, these gentlemen having retired from the Company. Their resignations as directors were accepted by the Company at a meeting of shareholders held on the 7th of May, 1909. The defendant William Smith claims to have paid Huggard the sum of \$5,126.75, and to Robison the sum of \$6,000, for their respective holdings of both Series "A" and "B" stock.

It does not appear what he claims to have paid Bennetto. This transaction may have been a *bona fide* one so far as the payment of the money was concerned; but in buying this stock from these parties the defendant William Smith did so with his eyes open; he knew every fact and circumstance in connection with the issue of this stock from the time it was first allotted, and he cannot claim that he was a *bona fide* purchaser from a duly registered owner without notice or knowledge of any defects in the title of such registered owner. Apparently this purchase included both Series "A" and "B" held by these parties; but I have no means of knowing how much of the alleged purchase price should be allocated to Series "A" and how much to Series "B". At this time it would appear that on Series "B" forty per cent. had been credited by the Assurance Company. It would appear that section 19 of the Act of Incorporation was a bar to any legal assignment of this stock from these parties to the defendant William Smith, as nothing whatever had been paid upon either series.

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On February 16, 1910, the directors of the Assurance Company passed the following resolution: "That a dividend of twenty per cent. be paid on the par value of Series 'A' stock and fifty per cent. on Series 'B,' 'C' and 'D' on the amounts paid in for these several classes of stock;" and a further resolution "that calls be made upon holders of Series 'B,' 'C' and 'D' classes of stock to the amount of five per cent. per annum for each ten per cent. paid on account of stock, equalling in each case the amount of dividend declared." It may be noted here that stock Series "C" and "D" are not in any way called in question in this suit, so that these resolutions must be regarded, for the purpose of this suit, as dealing only with Series "A" and "B".

In pursuance of the first of these resolutions a dividend of \$5,000 was paid to the defendant William

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Smith, by cheque of the Colonial Assurance Co., dated 22nd February, 1910, put in at the trial as Exhibit 12. The defendant William Smith, upon his examination for discovery, page 59, says that this cheque, referred to on such examination as Exhibit Y, was in payment of the twenty per cent. dividend on Series "A." He also says, at page 60 of such examination, that a further amount of \$5,000 was paid to him by a cheque, Exhibit 23, referred to on the examination as Exhibit Z. This is also the cheque of the Colonial Assurance Co., and is dated the 22nd February, 1910. It covers fifty per cent. on the amount then alleged to have been paid in on Series "B," namely, forty per cent.; and forty per cent. on \$25,000 would be \$10,000, and fifty per cent. of this last amount is the amount of this cheque.

The former of these cheques, Exhibit 12, the defendant William Smith cashed and got the money for. The latter, Exhibit 23, he deposited to the credit of the Assurance Company, so that the funds of that Company were only disturbed by the payment of the former cheque, and not at all by the issue of the latter, the only effect of which was to give the defendant William Smith a further credit of \$5,000 on his Series "B" stock, and caused a cross entry to appear in the Assurance Company's books.

As before stated, the defendant William Smith had acquired all the shares held by the original promoters, making his holdings in this respect two hundred shares. The outstanding certificates showing forty per cent. paid were surrendered and the amount "forty" in each was changed or intended to be changed to "sixty", as appears in Exhibit 21. Exhibit 21 apparently represents the existing stock certificates now outstanding for these shares.

At this time the clause in the Act of Incorporation, section 16, requiring a ten per cent. reserve fund, had



been repealed, so that objection no longer existed as to the payment of dividends.

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It was urged that this dividend was illegal because paid out of capital. The reports issued by the Company for the previous year 1910 to their shareholders were produced, also the returns made to the Government, and from these counsel for the plaintiffs attempted to show that there was a deficit of at least \$45,000 on capital account. I do not pretend to be able to analyze these statements and say definitely whether or not there was such deficit. I do not think sufficient evidence upon this point has been produced as to the Company's transactions during the year 1910 to enable me, even if I were competent to do so, to give a reliable answer to this question. However, I am not driven to do this. The witness Hooper, who was one of the auditors of the Assurance Company and was also a director, and who had been in touch with the affairs of the Assurance Company for some years, says that there was impaired stock ever since 1909; that he knew there was impaired capital when these dividends were paid. Hooper is a witness put forward by the defence, and I think, from his knowledge of the affairs of the Company, I am justified in accepting his statement upon this point, and in finding as a question of fact that there was impairment of capital in the years 1909 and 1910. Certainly under such circumstances no company could justify the payment of even the smallest dividend.

I do not think, however, that there was in fact any *bona fide* payment of this dividend in 1910 on Series "B" stock. At most it was a paper transaction which benefited the defendant William Smith and did not take out of the treasury of the Assurance Company one dollar; its ultimate effect, however, would be detrimental to the Company and its other shareholders, as, if effect is given to this payment, the Company's liability in respect

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of this stock Series "B" will of course be increased by that much and its paid up capital, upon which dividends in the future will be payable, thereby illegally increased.

There remains but one more transaction to investigate, and one which, to my mind, is even more extraordinary than those which I have so far considered. As stated before, the defendant William Smith had become possessed of all of the Series "A" stock outstanding, held by Bennetto, Robison and Huggard and his co-defendant, amounting to 200 shares, on which, as I have already found, nothing whatever had been paid to the Company. At a meeting of the directors of the Assurance Company, held on the 11th January, 1911, the following resolution was passed: "That the Company out of its funds pay to William Smith, president and manager of the Company, the sum of \$9,000 in consideration of his surrendering and cancelling to the Company certificates of stock Nos. 35, 36, 37, 38 and 39, representing 250 shares of Series A stock of the Company, fully paid up, of the par value of \$25,000."

This resolution covered not only the shares of the three other promoters, but the shares held by both defendants, being in fact the whole allotment of promoters' stock authorized at the meeting of the 17th of February, 1905. This resolution of the directors was confirmed at the annual meeting of shareholders held on the 22nd February, 1911, and in accordance with these resolutions the plaintiff Company issued its cheque, dated the 16th May, 1911, to William Smith for \$9,000. This cheque is put in as Exhibit 13, and was duly cashed by the defendant William Smith, and the stock certificates before referred to were surrendered to the Company.

In his examination for discovery, the defendant William Smith says as to this transaction that the real consideration for surrendering this stock was \$14,000, made up of \$5,000, the dividend on Series "A" stock

paid by Exhibit 12, before referred to, and the \$9,000 then paid to him.

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This transaction is objected to as being illegal and *ultra vires* the Company, being in effect a transaction in the nature of a purchase by the Company of its own stock. Even if these shares of Series "A" had been validly issued in the first place, I think the transaction was beyond the powers of the Company as it clearly amounted to a dealing by the Company, by way of purchase, in its own shares. And I think it more than ever questionable when it is remembered that this stock was bonus or promotion stock, for which the Company had never received a dollar of consideration, and the transaction, in my opinion, was little short of an act of plunder, which could only have been honestly assented to by the shareholders under a clear misunderstanding of the facts and the Company's legal position. Whether or not Smith could command a majority of the votes of both directors and shareholders, which enabled him to carry through this transaction, I cannot say; but it was apparently sanctioned by the shareholders; and whether or not misrepresentation was resorted to to secure their consent is immaterial in the view I take of the transaction.

The plaintiff Simpson was not at the shareholders' meeting at which this resolution was confirmed, and says he first learned of the transaction in the month of August or September following. The plaintiff Halpenny was at the meeting and strongly objected to the transaction and refrained from voting. He says in his evidence that there was no explanation given about the promoters' stock, and that, to his mind, all that appeared was that \$9,000 was going out for which nothing had been received.

An illegal or *ultra vires* transaction cannot be ratified, sanctioned or authorized by shareholders, either through a majority or by the whole body acting in concert, and I

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think this transaction was clearly illegal and must be set aside. The case of *Trevor v. Whitworth*, 12 A.C. 409, is authority for this, that a limited company, incorporated under the English Joint Stock Companies Act, has no power to purchase its own shares, and that a claim based upon an alleged purchase of shares by the Company from a shareholder could not be sustained. The transaction was held to be *ultra vires*. I think this law applies to this case, and that this transaction was also illegal and *ultra vires* the company and cannot be supported.

With respect to the issue of Series "A" stock, *Lindley on Companies*, at p. 548, lays it down that the issue of paid up shares otherwise than for value is a breach of trust on the part of the directors, and the company and its creditors are entitled to have such shares treated as not paid up unless they are in the hands of *bona fide* holders for value without notice of the facts, or, perhaps, unless they are in the hands of persons, who, though they have notice themselves, derived their title through a *bona fide* holder for value without notice, or unless the company is otherwise precluded from showing that they have not been paid up.

I have examined a number of English authorities as well as Canadian authorities and they all seem to point clearly to this proposition, that an allotment of shares otherwise than for value—that is, for money or money's worth—is *ultra vires* of the company. In this case I have no doubt that it was not only *ultra vires*, but was an actual fraud upon those who might, in ignorance of the facts, subsequently become shareholders in this Company. That it was the intention of the promoters to offer stock to the public was undoubted, and from the evidence of the individual plaintiffs I must hold that they purchased their stock in the plaintiff Company in

complete ignorance of the existence of these promoters' paid-up shares.

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The witness Corelli, who is also a stock holder, and who says he is interested in the success of this litigation, alleges the same thing. He was employed by Smith to effect sales of the Company's shares, and he sold nearly all the stock that was sold to the investing public; and yet he swears he was kept in entire ignorance of the fact that these 250 shares of stock had been issued as fully paid up when in fact nothing had been paid for them. I am asked by the defendants' counsel to disbelieve Corelli on this point. I do not see why I should. The defendant William Smith has refrained from going into the box—to my mind a very significant circumstance. The plaintiffs have been obliged largely to prove their case from admissions obtained from this defendant upon his various examinations for discovery. It is true the witness Hooper, called by the defence, says that the arrangement for getting rid of this promoters' stock was instigated by Corelli for the purpose of assisting him in selling the Company's shares. He does not say directly that to his knowledge Corelli was aware of the fact that these shares had never been paid for. Corelli says that Smith told him that this stock had been paid for by assets of the old company worth some \$17,000. I think it highly probable that Smith did tell Corelli this, as the trend of his examinations for discovery seem to indicate that he had some idea in his mind that these promoters were giving some value for this stock; but I cannot believe that he entertained this belief *bona fide*. As a man of affairs, business experience and knowledge of company transactions, it seems incredible that he could have honestly believed that value had been given by these promoters, including himself, for this stock.

A preliminary objection was taken at the trial by defendants' counsel to the use of the Company's name as

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the plaintiff in this action without the authority of the Company.

The witness Dick, as secretary of the Company, swore that no resolution of the Company authorizing the individual plaintiffs to use the name of the Company as a party plaintiff to this action had been passed. It is further urged that the statement of claim does not allege that the individual plaintiffs control a majority of the stock or that any effort has been made to obtain the Company's approval to the use of its name, or that any *ultra vires* or illegal act is threatened.

These contentions, in point of fact, are correct and at first I was inclined to think that the use of the Company's name, being unauthorized by resolution of the directors, was fatal to the plaintiffs' right to succeed in this action. Upon consideration of the authorities, however, I have come to a different conclusion.

The general rule, as stated in *Halsbury*, vol. 5, s. 473, that the Company's name should be used as a plaintiff only by the direction of the Company—that is, the shareholders or directors—is subject to certain exceptions. If the use of the Company's name as a party plaintiff cannot be justified, I have certainly power, under our Rule 345, to amend the record by striking out the Company as a party plaintiff, and adding it as a party defendant. Such an amendment was allowed upon demurrer in *Duckett v. Gover*, 6 Ch.D. 82, under the English rules of Court of 1875, Order 16, rule 12, and I would, if necessary, allow an amendment here in this way. But is this necessary?

*Daniel's Chan. Pr.*, 73, lays down the proposition that the exceptions from the general rule depend very much upon the necessity of the case—that is, the necessity for the Court doing justice. Again, the dictum of Wigram, V.C., in *Foss v. Harbottle*, cited by Jessel, M.R., in *Russell v. Wakefield Water Works Co.*,

L.R. 20 Eq. 480, makes it clear that "The claims of justice will be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue." And again, the dictum of Jessel, M.R., himself, at p. 482 of the same case: "As I have before said, the rule is a general one, but it does not apply to a case where the interests of justice require the rule to be dispensed with." And again, the dictum of Malins, V.C., in *Gray v. Lewis*, L.R. 8 Eq. 541: "It is moreover to be observed that if this objection (one to the frame of the suit) were to prevail it would only protract the litigation, and, as the official liquidator is a defendant, the result would not materially affect the constitution of the suit. I am of opinion, therefore, that the objections taken to the plaintiff are not fatal to the suit which must be decided on its merits."

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In view of our rule which gives the trial Judge complete discretion and control of the question of costs, what does it matter in a case such as this, upon which side of the record the Company is placed, if one can be assured that its rights and interests have been fully protected in the course of the litigation and at the trial? I have no doubt that such was the case here, as the success of the individual plaintiffs meant the success of the Company, and I am satisfied that everything in reason was done by the plaintiffs' solicitors to insure success in the action.

I have no means of knowing which set of shareholders has the control of the Company, and can direct its motions. Undoubtedly the Company is split into two factions. It may be that the individual plaintiffs are in the minority and could not obtain the requisite authority from the directors or shareholders to use the Company's name as a plaintiff. If the purposes of the action were at all doubtful as to being in the Company's interest, I would have little hesitation in giving effect to the defendants' objection. But a consideration of

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the statement of claim, to say nothing of the conclusions I have reached, indicates clearly that the purpose of the action is wholly beneficial to the Company. When this is the case, have I any right to assume that the shareholders, other than those implicated in the alleged acts of wrongdoing, would not be favorable to the proceedings, the successful result of which could only benefit themselves? I think not.

It is necessary that the Company should be a party to this litigation. It is such a party, and, although the individual plaintiffs have not shown any authority for the use of its name as a plaintiff, the merits of the case can, I think, be determined just as well with the Company as a party plaintiff as if it had originally been joined and now appeared upon the record as a party defendant. At any rate the authorities seem to be clear that a corporator who uses the name of a corporation as plaintiff need not have the previous sanction of the corporation for such use of its name: *Pender v. Lushington*, 6 Ch.D. 70; *Harben v. Phillips*, 23 Ch.D. 14.

The defendants took formal objection to this want of authority as a ground of defence in clause 18 of their statement of defence, alleging that the Company had been wrongfully and without its consent and against its wishes joined as a party plaintiff in the action. Under such circumstances the usual practice seems to be for the defendant to move to strike out the name of the Company as having been used without authority of the directors or of a general meeting, and the Court will take the means of ascertaining if this is so or not: *Daniel's Ch. Pr.*, p. 74; *Pender v. Lushington*, 6 Ch.D. 70; *MacDougall v. Gardiner*, 1 Ch.D. 22.

In the latter case it is said by James, L.J.:

"Any one of the shareholders might have filed this bill in the name of the Company and then, if the



directors had said, 'You are not the company; the majority do not act with you but with us,' the Court would, as it has done in other cases, have taken the means of ascertaining which party, the plaintiff or the defendant, really represents a majority of the Company."

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The defendants have not taken this course, and have not offered any evidence at the trial to show which party, plaintiffs or defendants, really represent the majority of the company. *Prima facie*, the individual plaintiffs, being shareholders, had, in my opinion, the legal right to use the Company's name to redress what are alleged to be wrongs to the Company and the shareholders other than the defendants, which a majority could not legally sanction, and to set aside a transaction said to be illegal, fraudulent, and *ultra vires* of the Company. I think I have shown abundant authority in the cases cited to support this proposition, and it was then open to the defendants to move in the matter if they contended that the majority were with them. If this had been shown to be the case and the acts complained of were nevertheless illegal, fraudulent or *ultra vires*, though done by a majority against the will of the minority, or if the concurrence of the minority had been obtained by fraud or misrepresentation, the result would be simply to make the Company a party defendant and allow the suit to proceed in the name of the individual corporators. I can see no valid reason now for refusing to proceed and decide the issue. I think I have the power to do so and believe I ought, in justice to the complainants, to do so. I therefore overrule the objection taken by the defendants to the frame of the action.

I refer to the following cases, which I have considered and followed in reaching my conclusions as set forth in this judgment: *Lindsay v. Imperial Steel & Wire Co.*, 21 O.L.R. 392; *Re McGill Chair Co.* (*Munro's case*),

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5 D.L.R. 73; *Re Jones & Moore Electric Co.*, 18 M.R. 549; *Welton v. Saffery*, [1897] A.C. 299, and particularly at pages 304, 305, 321, 322, 327, 328 and 329; *Trevor v. Whitworth*, 12 A.C. 414, 415, 423, 424 and 438; *The Ooregum Gold Mining Co. v. Roper*, [1892] A.C. 125; *N. W. Electric Co. v. Walsh*, 29 S.C.R. 46.

There will be judgment:

1. Declaring the allotment and issue of Series "A" stock *ultra vires* of the Company and illegal and void *ab initio*, and setting aside the allotment and issue of Series "A" stock and all subsequent transfers thereof under which the defendant William Smith acquired this series and directing the defendant William Smith to deliver up forthwith for cancellation the certificates held by him, if any, representing the said Series "A" stock.

2. A rectification of the register of shares of the Company in accordance with the foregoing order.

3. That the stock issued to the defendants and to Israel Benneto, J. T. Huggard and H. E. Robison, pursuant to the resolution of the directors of the Company passed on the 17th. of February, 1905, known as Series "B" stock, is now wholly unpaid; that no calls made thereon have been paid by any one and that the defendants now hold the said stock Series "B" as wholly unpaid stock, and there will be a rectification of the register of shares of the Company in this respect, if necessary.

4. That the defendants are not entitled to vote, and are hereby enjoined from voting, at any meeting of shareholders in respect of said Series "B" stock until all default in respect to payment of calls thereon is remedied.

5. That all resolutions of the Company purporting to declare dividends upon Series "A" and "B" stock of the company were and are *ultra vires* of the Company

and illegal and void, and that the same be rescinded and cancelled, and that all dividends paid upon Series "A" and "B" stock to the defendants or either of them by the Company be forthwith repaid to the Company by the defendants in proportion to the amounts so received by them, together with interest thereon at the rate of five per cent. per annum from the time when such moneys were so received by the defendants or either of them.

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6. That the resolution of the directors of the Company passed at its meeting on the 19th day of January, 1911, and the subsequent resolution of the shareholders of the Company passed on the 22nd day of February, 1911, confirming the said directors' resolution and authorizing the payment of \$9,000 to the defendant William Smith in consideration of his surrendering and cancelling to the Company certificates of stock Nos. 35, 36, 37, 38 and 39, representing 250 shares of the Company, are *ultra vires* of the Company and illegal and void and a fraud upon the Company, and that the defendant William Smith shall forthwith repay to the Company the said sum of \$9,000, together with interest thereon at the rate of five per cent. per annum from the date when the same was received by him.

7. That the defendants pay the costs of this action, including all examinations for discovery purposes, and upon affidavits filed upon the motion for injunction made herein, and that, if necessary, the statutory limit as to costs be removed to enable the plaintiffs to recover their full taxed costs of the action and disbursements.

8. That defendants be enjoined from voting at any meeting of the Company upon Series "B" stock until the default in payment therefor as aforesaid is remedied, and that said defendants be further enjoined from disposing of or transferring said Series "B" stock until such default is remedied.

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9. There will be a reference to the Master of this Court to ascertain what moneys have been received by the defendants or either of them in respect of said Series "B" stock, and I reserve further directions and costs of the reference until the said Master shall have made his report herein.

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### COURT OF APPEAL.

#### RE TAYLOR AND CANADIAN NORTHERN RY. CO.

Before HOWELL, C.J.M., PERDUE, CAMERON and HAGGART, J.J.A.

*Arbitration and award—Railways—Railway Act, R.S.C. 1906, c. 37, s. 192, s-s. 2, as amended by 8 & 9 Edw. VII, c. 32, s. 3—Meaning of expression "arbitration now pending"—Compensation for lands taken—Date as of which compensation to be ascertained—Construction of statutes.*

An arbitration is not commenced or pending until arbitrators have been appointed and they cannot be said to be appointed until they have accepted office as such, and an arbitration under the Railway Act, R.S.C. 1906, c. 37, to determine the compensation to be paid to a land owner for lands compulsorily taken cannot be said to be pending until, at the earliest, the arbitrators have been sworn under section 197 of the Act.

*Ringland v. Lowndes*, (1863) 15 C.B.N.S. 173, and *Baker v. Stephens*, (1867) L.R. 2 Q.B. 523, followed.

The proceedings in this matter were commenced in 1906 by the service on Taylor of the usual notice of expropriation offering \$7500 for the property. Taylor did not accept the offer and, in 1907, an order was made under section 196 of the Act, appointing three arbitrators to determine the compensation. Mr. Galt, one of these three, refused to act and nothing was done under the order. In April, 1910, the Railway Company, with the consent of the owner, withdrew its former offer and made a new offer of \$17,000 for the property and, on 4th May, 1910, an order was made by consent, reciting the former order and the refusal of Mr. Galt to act, and appointing two of the former arbitrators and a third as "arbitrators for the purpose of hearing and determining the arbitration in this matter." They did not enter upon the reference until May, 1912. In making their award, they ascertained the compensation payable as of the date of the deposit of the plan, &c., which was 1st November, 1906 acting on sub-section 2 of section 192 of the Act.

The Railway Company had not yet acquired title to the lands, and the owner contended that the amendment of that sub-section by section 3 of chapter 32 of 8 & 9 Edward VII, which came into force on 19th May, 1909, required that the compensation should be ascertained as of the date of the acquisition of title by the Company, but the arbitrators refused to admit evidence of the value in 1912, considering that the second proviso in said amendment applied and that this "arbitration" had been pending at the time of the coming into force of that amendment.

*Held*, (CAMERON, J.A., dissenting), that the exception in said proviso did not apply, as the arbitration was not pending until after 19th May, 1909, that the arbitrators should, therefore, have ascertained the compensation as of the date of the award, and that the same should be set aside with costs.

*Per* CAMERON, J.A., dissenting. There was nothing done that was intended or could be taken as intended to abandon wholly the original notice of expropriation. There was only a substitution of a larger amount than that first offered. There was no order rescinding the first order appointing arbitrators, nor could such be made: *Chambers v. C. P. R.*, (1910) 20 M.R. 279, and the order of May, 1910, must be taken as only an exercise of the power of appointing an arbitrator in the place of one who dies or refuses to act conferred by section 206 of the Act and should be treated as only an amendment of the first order. These arbitration proceedings, therefore, had their origin in the notice of expropriation of October, 1906, or, at the latest, when the owner refused the offer then made: *R. v. Manley-Smith* (1893) 63 L.J.Q.B. 171, and the arbitration in this case, as that term is used in the amending statute of 1909, had its inception in the order appointing arbitrators made in January, 1907, so that the date fixed by the Act prior to the amendment of 1909 is the date as of which the compensation must be ascertained.

At the time of the passing of the statute relied upon, the Company had a vested right to have the compensation ascertained as of the earlier date, and that statute should be interpreted, if possible, so as not to take away any such right: *Hough v. Windus*, (1884) 12 Q.B.D. 237, *per* Bowen, L.J., and *Craies' Hardcastle*, page 326, and the language used is not sufficiently clear and unambiguous to warrant the Court in saying that Parliament intended to take away that vested right in this case.

DECIDED: 17th March, 1913.

APPEAL from an award made under the provisions of the Railway Act, R.S.C., 1906, c. 37. The property in question was lot No. 33, fronting on Wesley Street in the City of Winnipeg, as shown on the plan filed, which, with certain adjacent property, was dealt with by the

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Board of Railway Commissioners in an order dated September 22, 1906. By that order the Railway Company was given authority to acquire the lands from the owners upon certain conditions, one of which was that the documents required by section 153 (now 192) of the Railway Act to be deposited should be deposited, and the notice provided by section 154 (now 193) should be given on or before November 1st then next following. There was a further provision continuing the use of the then existing facilities in connection with a railway siding to the owners until possession should be taken by the Railway Company, possession in the meantime remaining with the former.

The notice of expropriation under the statute was duly given October 26, 1906, expressing the intention of the Railway Company to take the property and its willingness to pay the sum of \$7,500 as compensation.

The plans were filed November 1, 1906.

An order was taken out January 10, 1907, appointing W. J. Christie, James Scott and G. F. Galt arbitrators.

The time for fixing the value of the property as the proceedings then stood was, under section 192, November 1, 1906.

In 1909 section 192 of the Railway Act was amended by section 3, chapter 32, of 8 and 9 Edw. VII.

By notice dated and served April 21, 1910, the Railway Company withdrew the offer of \$7,500 made in its notice of expropriation and substituted therefor \$17,000.

By an order dated May 4, 1910, made upon the application of the owner, wherein was recited the order of January 10, 1907, above referred to, and that George F. Galt had refused to act as arbitrator, to which the Railway Company had consented, it was ordered that "C. H. Newton, W. J. Christie and James Scott be

and are hereby appointed arbitrators for the purpose of hearing and determining the arbitration in this matter.” 1913  
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Pursuant to this last order the arbitrators made their award July 4th, 1912, fixing the compensation to be paid at \$16,950. James Scott did not concur in this, and made a separate award.

Taylor appealed.

During the progress of the arguments counsel for the claimant stated that he wished to raise the point that the arbitrators were in error in fixing the value of the lands as of November, 1906, when the plan was filed by the C.N.R. instead of the date of the arbitration.

Counsel for the Railway Company objected to this on the ground that the point had not been raised before the arbitrators and was not one of the grounds taken in the præcipe filed on the appeal.

THE COURT intimated that the question might be raised under the ground stated on the præcipe in appeal that the arbitrators improperly rejected evidence as to the value of the land at the time the evidence was taken before the arbitrators, and that, in any event, the objection could be met by an amendment of the proceedings and an adjournment of the hearing, if necessary, which, however, counsel for the Company said he did not want.

*A. B. Hudson* for Taylor cited *Ringland v. Lowndes*, 15 C.B.N.S. 172; *Baker v. Stephens*, L.R. 2 Q.B. 523; *Burlington v. Burlington*, 41 Atl. Rep. 514; *Cudliff v. Walters*, 2 Moo. & R. 232; *Commissioners v. Glasgow*, 12 A.C. 315; *Armstrong v. James Bay*, 12 O.L.R. 137, 38 S.C.R. 511, [1909] A.C. 624, 631; *Stebbing v. Metropolitan*, L.R. 6 Q.B. 37; *Ripley v. G.N.Ry.*, L.R. 10 Ch. 435; *Cowper-Essex v. Acton Local Board*, 14 A.C. 153; *Re Scott and Railway Commissioner*, 6 M.R. 193, 201, and *McMurphy & Dennison*, 293, 295.

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*P. A. Macdonald* for the Company cited *Mercer v. Liverpool*, [1904] A.C. 461; *Re C.N.R. and Robinson*, 17 M.R. 583; *Davies v. James Bay Ry.*, 10 Can. Ry. Cas. 225; *Atlantic v. Wood*, [1895] A.C. 257, and *Cowper-Essex v. Acton Local Board*, 14 A.C. 167.

HOWELL, C.J.M. In this matter the Railway Company desired to acquire lands to extend their station grounds, not under section 177, but under section 178 of the Dominion Railway Act, and, having got the necessary order, they were required by s-s. 6 to deposit with the Registrar of Deeds "such duplicate authority, plan, profile, book of reference and application." I assume that the "application" referred to in that sub-section is a copy of the "application in writing" referred to in clause (b) of sub-section 3, a notice of which is to be served on the owner by sub-section 2.

I think clearly section 191 is intended only to refer to the acquiring of the right of way provided for under sections 159, 160 and 177, and section 192 is for the purpose of acquiring title to this right of way, where the owners are unwilling to sell, and I am fortified in this by the language used in s-s. 7 of section 178, wherein it is provided that "All the provisions of this Act applicable to the taking of lands without the consent of the owner for the right of way or main line of the railway shall apply," etc., and then follows the exception that the requirements of sections 159 and 160 as to filing plans shall not be necessary in matters coming under section 178.

This matter was submitted to the Board on September 22, 1906, and on that day an order was made: "That upon and subject to the conditions hereinafter set forth the applicant Company be and it is hereby given authority to take and acquire the lands and premises hereinafter described as follows:" and the papers



required by the Act were deposited in the Registry Office on the 1st day of November following.

Not until the deposit of this plan did the Company have any power to take this property.

Section 192 states that the deposit in the Registry Office "and the notice of such deposit" shall be notice to all. Now what notice does that refer to? I should say the notice by publication in the newspaper under section 191, which it seems to me cannot apply to this case. Section 193 prescribes what "the notice served upon the party shall contain," but nowhere in the Act that I have seen is it declared that such a notice shall be served.

On October 26, 1906, the Company served on Taylor a notice which complies with the requirements of that section and section 194, wherein they offer the owner the sum of \$7,500. It will be seen that the notice was served before the deposit of the plans, but all parties acted upon it and appeared before a Judge, who, on January 10, 1907, made an order appointing three men—Christie, Scott and Galt—"arbitrators to determine such compensation" in the language of the order. I assume that Taylor had not given notice under section 196 that he accepted the sum offered.

Nothing apparently was done under this order, and on April 19, 1910, the solicitors for Taylor wrote to the solicitors for the Company as follows:

RE TAYLOR v. C. N. R. ARBITRATION.

"Dear Sir:—

In this matter we are willing to consent to your making another offer of settlement on condition that same is made at once, and upon the further condition that in the event of our client not being satisfied to accept same that you will appear with us in Judge's Chambers next Monday for the purpose of having the arbitrators appointed.

Please let us have a letter confirming this arrangement."

And thereupon the Company served on the owner the following notice:

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## "THE RAILWAY ACT."

TO WILLIAM A. TAYLOR, of the City of Winnipeg in the Province of Manitoba, Fruit Dealer.

TAKE NOTICE that The Canadian Northern Railway Company hereby withdraws the offer of seven thousand five hundred (7500) Dollars made in its notice of expropriation dated the 26th day of October, 1906, and served upon you the same day, and substitutes therefor the offer of seventeen thousand (17,000) Dollars, which said sum it is now ready to pay as compensation for the property described in said notice, being, 'In the City of Winnipeg in Manitoba and being in accordance with the special survey of said City of Winnipeg and being lot Thirty-three (33) in block One (1), which lot is shewn on a plan of survey of part of lot One (1) of the Parish of St. John, registered in the Winnipeg Land Titles Office as plan No. 129.

Dated at Winnipeg this twenty-first day of April, A.D. 1910.

THE CANADIAN NORTHERN RAILWAY CO.

Per Clark & Sweatman,  
their Solicitors."

This was followed by an order of Mr. Justice Prendergast, as follows:

"Upon the application of counsel for the above named W. A. Taylor, and upon it appearing that by an order of this Court, dated tenth day of January, 1907, George F. Galt, W. J. Christie and James Scott were appointed arbitrators for the purpose of hearing the arbitration herein,

And it further appearing that the said George F. Galt has refused to act as such arbitrator, and upon counsel for the said Railway Company consenting thereto,

IT IS ORDERED that C. H. Newton, W. J. Christie and James Scott be and they are hereby appointed arbitrators for the purpose of hearing and determining the arbitration in this matter.

Dated the 4th day of May, 1910."

From the minutes filed I infer that the arbitrators appointed under the last order took the oath of office under section 197 on May 14, 1912, and met for the first time on that day as arbitrators pursuant to a notice served on the owner. Witnesses were called and, after evidence was taken, the arbitrators made an award in writing, which recites that, by order bearing date 4th May, 1910, they were appointed arbitrators in this matter, and, further, that they had taken upon themselves the burden of the said arbitration, and they awarded to the owner as compensation the sum of \$16,950.

In taking the evidence, the arbitrators assumed that the date of deposit of the plans in 1906 was the time at which they should consider the value of the property in estimating the compensation to be awarded and they refused to take evidence of the value in 1912.

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I shall assume that the deposit referred to in sub-section 2 of section 192 is the deposit required by section 178, s-s. 6, as well as that required by section 160, and this involves a consideration of 8 and 9 Edw. VII, c. 32, s. 3. That section is an amendment to s-s. 2 above mentioned, and was intended to remedy a manifest wrong, a wrong that would have taken place in this case but for my view of the application of the amendment to this case. Parliament considered, no doubt, that, if the owner chose not to accept the offer, he found his land tied up, he could not sell and he dare not improve the property which he wished to occupy, and perhaps even at the last moment the Company might, under section 207, "abandon the notice and all proceedings thereunder," and there is some authority that this might be done by the Company even after all the evidence has been submitted to the arbitrators and while they are considering their award.

Section 3 of chapter 32, adds to sub-section 2, above referred to, the following:

"Provided, however, that, if the company does not actually acquire title to the lands within one year from the date of such deposit, then the date of such acquisition shall be the date with reference to which such compensation or damages shall be ascertained; and provided, further, that the foregoing proviso shall not prejudice the operation of any award, or of any order or judgment of any court of competent jurisdiction, heretofore made, or any arbitration now pending, and any appeal from any such award, order or judgment shall be decided as if the foregoing proviso had not been enacted."

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C.J.M.

This section became law on 19th May, 1909.

Parliament might have said that it should not apply to any case where the deposit in the Registry Office had then been made or where the notice under section 193 had been served, or where arbitrators had been appointed, and the matter then would have been clear; but instead of that the limitation is to such an advanced step as an award or order or judgment heretofore made, and "to any arbitration now pending." All these are put in the same class, and this indicates to me that Parliament intended that active proceedings must have been taken towards finding the value in order to prevent the application of this wholesome law.

Section 197 sets forth the first step to be taken towards an award and the order creating the tribunal which made this award was issued on 4th May, 1910. They acted solely on this order and commenced the actual arbitration by meeting and taking the oath and examining witnesses in 1912.

In sections 199 and 201 the word "arbitration" is used, but it does not assist in giving a construction to the amendment. It might be said that, when the Company applied to the Board for the order, or at all events after the order was made, and before deposit in the Registry Office, an arbitration was "pending"; but, if the man in the street or even the average legislator was asked "When is an arbitration pending?" I venture to say that he would answer: "After the arbitrators have taken office," or at all events after they have been appointed.

Considering the object of this remedial legislation, it seems to me that Parliament intended, by the words "any arbitration now pending," to mean any matter where arbitrators had been appointed and had taken office, at least under section 197.

I have not overlooked the remarks of the Chief Justice

of the King's Bench in *Robinson v. C. N. R.*, 17 M.R. 583. That case involved only the question of costs and perhaps the acts incidental to or leading up to arbitration in expropriation proceedings might justly be allowed.

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The first offer of the Company was \$7,500 and four years later they decided that this offer was less than fifty per cent. of what it ought to be and offered \$17,000. Two years later the arbitrators fix the value at this sum less \$50. One wonders if they were influenced by the question of costs under section 199.

During the six years apparently the Company did not particularly require this land, for they took no proceeding to acquire possession, as they might have done under section 215, and during all that time the owner was crippled in the use of his property, for he dare not build or add to the simple stable then upon the land.

The two arbitrators who signed the award do not tell us how they arrive at \$16,950; the third arbitrator gave details of how he arrived at a sum more than twice that found by the majority, and amongst these details is an item of \$2,500 as ten per cent. on the value of the land because of a compulsory sale. Mr. Justice Idington in *Dodge v. King*, 38 S.C.R. at 155, seems to indicate that a sum of that kind might well be added for damages done to business carried on on the premises by reason of being turned out of possession; but I should certainly think that no such item of that kind ever entered into the minds of the majority of the arbitrators.

It seems to me the facts in this case show strongly the reasons which induced Parliament to pass the statute amending the Railway Act of 1906, shifting the date for taking the value to a later period than the deposit in the Registry Office.

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C.J.M.

Having come to this conclusion, the other points raised need not be considered.

A great number of cases were cited by counsel, but, as they do not apply to this branch of the case, I have not referred to them.

There is, of course, no evidence upon which this Court can fix the value at the date of the arbitration or at the date when the Company could acquire title under section 210, which section seems to provide that the making of the award really confers a title.

The appeal is allowed with costs and the award is set aside.

PERDUE, J. A. I have had the privilege of reading the reasons for judgment prepared by the learned Chief Justice of this Court, and I agree with them. I would add the following observations upon what is the crucial point in this case, namely, is the valuation of the land in this case to be made as of the date of acquisition, under 8 and 9 Ed. VII, c. 32, s. 3, or does this case fall within the second proviso in that section as being an arbitration pending when the above Act came into force?

In considering this question, we must endeavor to gather as well as we can what was the intention of Parliament in making the amendment made by the above section. It appears to me that the intention was to prevent land from being tied up by a railway company for a long time without steps being taken to ascertain its value, and then having the valuation made as of a time long past, although the real value of the land may have been greatly enhanced in the interval. By the amending section a railway company is allowed a year from the deposit of the plan, etc., in which to acquire title to the lands. If the Company fails to acquire title within the year, then the date of the acquisition shall be the date with reference to which

the compensation shall be ascertained. But manifestly it would be unjust to make this provision apply to awards, orders or judgments pronounced before the Act came into force. It was also deemed proper that an arbitration then pending should also be excepted from its operation.

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PERDUE,  
J.A.

What is meant by an "arbitration now pending" as referred to in the Act? A suit is pending as soon as it is commenced by writ or other process, and remains so until its conclusion. An arbitration also is pending as soon as it has been actually commenced and is proceeding towards completion. Counsel for the Company contends that, before the amending Act came into force, the preliminary steps were taken and three arbitrators were appointed by a Judge's order as far back as January, 1907. These arbitrators were not sworn as required by the Railway Act, and never entered on their duties. One of them, Mr. Galt, appointed by the Judge, but not named by one of the parties, refused to act; see order of 4th May, 1910, in which this refusal is stated. In 1910 another notice was served by the Company making a new or substituted offer of \$17,000 instead of \$7,500 as originally offered. Shortly thereafter the order of 4th May, 1910, was made appointing a new board of arbitrators. Mr. Newton being substituted for Mr. Galt. Still, the Company contends that all along since January, 1907, arbitration was pending.

An arbitration cannot be held to have been commenced until arbitrators have been appointed. An arbitrator is not appointed until he has both been named in the order and has accepted office as such: *Ringland v. Lowndes*, 15 C.B.N.S. 173, 196: and he enters on the reference, not when he accepts the office, or takes on himself the functions of arbitration by giving notice of his intention to proceed, but when he enters into the

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actual matter of the reference: *Baker v. Stephens*, L.R. 2 Q. B. 523.

No arbitration had, therefore, been commenced when 8 and 9 Edw. VII, c. 32, came into force, and, if none had been commenced, it seems to me clear that none was pending. The preliminary steps that had then been taken, such as giving notice and appointing arbitrators, only show that an arbitration was contemplated not that it was actually going on or pending.

Whatever may have been done in this case, with a view to arbitration, at the time the above Act came into force, it was subsequently abandoned by the Company. A new offer of a very largely increased amount was made in 1910 after the Act had come into force, and the refusal by Taylor to accept this new offer formed, under sections 193 and 196 of the Railway Act, the very basis upon which a board of arbitrators was afterwards appointed, a board which actually proceeded with the reference and made the award against which this appeal is brought. The arbitration which took place in 1912, and which dealt with the question of the compensation to be allowed, was certainly not pending when the amending Act came into force.

It is claimed by Taylor that the notice given by the Company in 1906 tied up the land so that he could not deal with it. The Company itself was not bound to take the land. They allowed several years to elapse before making a reasonable offer of compensation or bringing on an arbitration, and this while the value of the land was largely increasing. Now they contend that Taylor is bound to take the value of the land as it was in 1906. I think the intention in passing the amendment, 8 and 9 Edw. VII, c. 32, s. 3, was for the very purpose of remedying such an injustice as that. Unless, therefore, the Company can bring this case clearly within the second proviso in section 3, so that the remedy



afforded by the earlier portion of the section does not apply, the date of acquisition is the date with reference to which the compensation must be ascertained.

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No evidence as to the value of the land at the time of the reference was received by the arbitrators. It is, therefore, impossible for this Court to find from the evidence the amount of the compensation to be allowed. It seems to me that the only course is to allow the appeal with costs and set aside the award.

CAMERON, J. A. The principal question discussed before us was with reference to the bearing on the case of the amendment of 1909, which is as follows:

"3. Sub-section 2 of section 192 of the said Act is amended by adding thereto the following: 'Provided, however, that, if the Company does not actually acquire title to the lands within one year from the date of such deposit, then the date of such acquisition shall be the date with reference to which such compensation or damages shall be ascertained; and provided, further, that the foregoing proviso shall not prejudice the operation of any award, or of any order or judgment of any court of competent jurisdiction, heretofore made, or any arbitration now pending and any appeal from any such award, order or judgment shall be decided as if the foregoing proviso had not been enacted.'"

On the taking of testimony by the arbitrators evidence was tendered by the owner of the then present value of the premises for the purpose of giving a basis on which to fix the value as of the date of the filing of the plan. The arbitrators did not receive the evidence. The contention that the arbitrators should fix the value as of the date of the award or arbitration, and not as of that of the deposit of the plan, was not specifically taken before the arbitrators, and it was urged that we should not now give effect to it. But, if the amendment does affect the basis of compensation, the fact that it was not brought to the attention of, or acted

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on by, the arbitrators ought not to prejudice the position of the owner. That this contention does not appear to be plainly disclosed in the notice of appeal cannot be material, as it would merely necessitate an adjournment which counsel for the Railway Company decided he did not want.

The principal point in controversy is whether the amendment of 8 and 9 Edw. VII applies to this case, so that the construction of the words "arbitration now pending" becomes important. On behalf of the Railway Company it is urged that the "arbitration" commenced before the day the amendment came into force. On the other hand, it is contended that the arbitration cannot be said to have commenced until the arbitrators entered on their duties long after the date of the amendment.

The notice of expropriation in this case, given October 26, 1906, complied with the provisions of section 193, stating, (a) the lands to be taken, and (b) "a certain sum," to wit \$7,500, which the Company was willing to pay therefor. If the owner does not give notice of his willingness to accept that amount, then the Judge is, on the application of the Company, to appoint a sole arbitrator, or, at the request of either party, three arbitrators. The latter was the course adopted in this case.

If the Company desire to desist from or abandon the notice or to amend it, it can, where the notice improperly describes the lands, or where the Company decides not to take them, abandon the notice and all proceedings thereunder, and shall thereupon be liable for damages or costs incurred (sec. 207). No other provision is made whereby the Company can withdraw, or modify, the notice, once it is given. The subsequent notice, dated April 21, 1910, given by the Company, increased the amount offered to \$17,000. This had nothing what-

ever to do with any improper description of the lands or with a decision of the company not to take them, and therefore could in no way affect the first part of the original notice, stating the lands intended to be taken, and, in fact, the Company never abandoned its intention to take the lands. Nor could it affect the second part of the notice as to the sum offered, as the statute gives it no such power. The parties might agree that it should be taken that the Company might increase its offer and in such a case the amended offer might affect the costs of the arbitration under section 199. There was an agreement here that the Company might amend its first offer, but there was nothing done that was intended or could be taken as intended to abandon wholly the notice of expropriation. It was intended merely to substitute \$17,000 for the \$7,500 originally offered by the Company. It is not necessary here to consider what effect that substitution could have upon the costs of the arbitration.

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In *Haskill and G. T. R.*, 7 O.L.R. 431, the Company had actually taken possession of the land, while here the Company persisted in its declaration of intention to take, which was all it could do under the order of the Board. It did not desist or abandon, and it had no authority to do so, except on the grounds specified in section 207.

The original order appointing arbitrators was made January 10, 1907. The Judge (of a Superior Court or County Court) making this order is *persona designata* and his order is not subject to review on appeal, nor can he rescind or review it himself, except on the grounds set out in section 206, whereby, if an arbitrator dies or refuses to act, the Judge shall appoint another. I refer to the judgment of Chief Justice Mathers in *Chambers and C. P. R.*, 20 M.R. 279. The order, therefore, of May 4, 1910, reciting that Mr. Galt had

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refused to act, and, in fact, appointing Mr. Newton in his place, and in terms appointing the three arbitrators, two of whom, however, had been named in the previous order, must be taken as an exercise of the power conferred by section 206. There is no order rescinding the first order. There was, in law, no authority for such. But there was and is power to substitute an arbitrator in the place and stead of one already appointed who had refused to act as had Mr. Galt in this instance. The last order was therefore an amendment of the first order made, under the authority of the Act, and its precise wording cannot be material.

Looked at in this light the arbitration proceedings had their origin in the notice of expropriation of October 26, 1906, or, at the latest, in the refusal of the owner to express his willingness to accept the sum of \$7,500 then offered. The arbitrators were duly appointed in January following, and a substitution was made for one of them in accordance with the provisions of the Act by a later order. The arbitrators then entered upon the performance of their duties and made the award now appealed from. In these circumstances, what is the effect of the amendment above set forth?

In *Reg. v. Manley-Smith*, 63 L.J.Q.B., an arbitration under two arbitrators and an umpire had been commenced under the Lands Clauses Act. Owing to the death of the umpire the parties agreed to submit the matter to a sole arbitrator. An award having been made exceeding the amount offered it was held that the owner was entitled to the costs from the initiation of the proceedings, and that the substitution by agreement, of one arbitrator for the three originally appointed, did not put an end to the original submission. "Though the agreement here might be deemed a fresh submission, it was nevertheless a continuation of the statutory submission originally made," per Wright, J., p. 173.

Once the notice of expropriation is given the relation of vendor and purchaser, to a certain extent and for certain purposes, arises.

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"The effect of this (i.e. giving the notice to treat), as is now settled, was to create a relation between the company and the respondent analogous to that of purchaser and vendor, but the price was not yet ascertained. Till that was done the land still remained the property of the respondent, in equity as well as at law, but the company had acquired a right to have the price ascertained, and for that purpose to summon a jury, and then, when the price is ascertained (by sects. 69 to 80), on tender of the price to have the land conveyed to them, or, if the landowner could not or would not make a title, to deposit the price ascertained in the bank, and execute a statutable conveyance, on which the lands shall vest absolutely in the promoters of the undertaking. The landowner has a correlative right; if he pleases, he may, at any time before the company have issued their warrant for summoning a jury, by *mandamus* compel them to do so:" per Lord Blackburn in *Tiverton & North Devon Ry. v. Loosemore*, 9 A.C. 493..

Once the owner has allowed ten days to elapse without notifying the company of his acceptance of the offer it becomes imperative on the company to apply to a Judge for the appointment of an arbitrator, and thereupon the proceedings cease to be proceedings to arrive at the damages by consent and become proceedings intended to fix it by arbitration. Is the term "arbitration," as used in the amendment of 1909, confined to that part of the proceedings subsequent to the order appointing the arbitrators or subsequent to the time when the arbitrators assume the burden of the arbitration by taking the requisite oath, or does it refer only to those proceedings in which the arbitrators are actually engaged in the performance of their duties? Or, on the other hand, is "arbitration" a comprehensive term intended to include the proceedings from the giving of the notice, or from the time when action under the statute is first taken in con-

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sequence of the owner's refusal to accept the company's offer, or from the appointment of arbitrators under the Act?

The term "costs of the arbitration" in section 199 has been generally understood to include the costs of and incidental to the arbitration. But this may be due to the meaning given to the term "costs" by reason of subsection (5) of the interpretation clause. The analogous section of the Lands Clauses Act contains the words "or incident thereto" which may make a difference between the English statutory provision and our own.

It is a well "recognized rule that statutes should be interpreted, if possible, so as to respect vested rights": *Hough v. Windus*, 12 Q.B.D. 237, Bowen, L.J., It is not to be presumed that interference with existing rights is intended by the Legislature, and if a statute be ambiguous the Court should lean to the interpretation which would support existing rights: *Craie's Hardcastle*, 326.

Here we have the case where, on the notice of expropriation having been given, the parties stand in a new relation, analogous to that of vendor and purchaser, the price not being ascertained, but the company having the right to have it ascertained as of the date of the filing of the plan, and the giving of the notice and tender or payment of that price vests in the company the right to take possession (section 215); and, if immediate possession be necessary without an award or agreement, that can be had under section 217.

The term "vested right" is not readily capable of close definition. It may be defined as "A right to do or possess certain things which the parties had already begun to exercise, which is either authorized by the statute or to the exercise of which no obstacle exists in the laws which have been enacted: the power one has to do certain actions, or to possess certain things, according to the laws of the land." *Cyc.* xxxv, 199. See also further definitions in *Cyc.* viii, 894.

Here the Company had a right, vested or existing, to take over the possession of and title to the property in question upon the compensation or price payable therefor being ascertained in the manner fixed by the statute then in force, and the payment or tender thereof. An amendment to the general law fixed a later period as the date with reference to which the compensation is to be fixed, and is not positively clear in its terms as to whether Parliament intended it to apply to cases wherein the proceedings have already been commenced to determine the compensation payable, but wherein the arbitrators have not yet actively entered on the performance of their duties. The aim of Parliament was no doubt to prevent railway companies employing dilatory tactics in these expropriation cases. But the general principle, that it will be presumed that the Legislature did not intend to interfere with existing rights unless the contrary appears, can be invoked in favor of corporations as well as of individuals and is of uniform application.

Under the statute and under the order of the Railway Board, the Company in this case, by giving the prescribed notice and filing the necessary plans, acquired certain rights, the principal one of which was to take over the possession of the property and the title thereto on payment of the compensation therefor to be determined as of the date of the giving of such notice and filing of such plans. Clearly the amendment of 1909 fixes an entirely different measure of compensation from that in force at the date of the order of the Railway Board and of the original order appointing arbitrators, and thereby materially alters and disturbs existing rights of the railway company. Unless, therefore, there is, in the amendment itself, a clear indication of the intention of Parliament that its terms should apply to cases where the arbitration proceedings have been instituted before its passage, it should not be held applicable to such cases,

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and I can read no such unambiguous declaration of intention in the words of the amendment. It is quite consistent with the policy of Parliament, having due regard for statutory rights previously created, to read the term "arbitration" as used in a comprehensive sense and as including not only the proceedings of the arbitrators when actually in session, but also the other proceedings necessarily incidental thereto. If we give effect to the owner's contention, then, had the three arbitrators originally appointed taken their oaths and entered actively upon their duties on the 20th day of May, 1909, the amendment in question must, nevertheless, have applied. It would seem difficult to hold that such could have been the deliberate intention of Parliament, and that the legal relations of the parties should be so fundamentally and summarily altered; especially would that be the case here where the arbitration proceedings were taken pursuant to an order of the Board of Railway Commissioners.

The provisions of all expropriation Acts are for the public benefit. Without them the construction of railways would manifestly, owing to the excessive demands of land owners, be, in many cases, unreasonably costly and, in some cases, impracticable. Such provisions are, under the Interpretation Act, remedial in character, and the amendment of 1909 stands in no peculiar position in that respect. So that we come back to the question whether there is expressed in the amendment a definite intention that the date fixed by the original statute for the ascertainment of compensation shall be wholly altered in all cases, saving only those, however, where the arbitrators have actually met and entered on the performance of their duties.

Upon consideration and with a due appreciation of the difficulties arising in the matter, I have reached the conclusion that the arbitration, as the term is used in the amendment, had its inception in this case in the order



appointing arbitrators made January 10, 1907, and that the date fixed by the Act prior to the amendment of 1909 is the date as of which the compensation payable to the owner must be determined.

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I have examined the evidence submitted to the arbitrators. It seems to me impossible to regard the claim for damages in respect of the warehouse intended to be erected by the owner as one that could be entertained. It is entirely too remote and speculative. As to the rest of the evidence, I would say that I cannot find that the arbitrators have acted on any wrong principle or that their award is not warranted by the evidence. I can discover no error of law or fact or excess of jurisdiction on the face of the award or on the evidence. There is no adequate reason, therefore, in my judgment, why the award should be disturbed.

HAGGART, J.A., concurred with Howell, C.J.M., and Perdue, J.A.

### COURT OF APPEAL.

#### WILLOUGHBY V. WAINWRIGHT.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*Limitation of actions—Bills and Notes—Lien notes—Right of action, when it accrues.*

1. The maker of a promissory note or the acceptor of a bill of exchange has the whole of the last day of grace in which to pay it and an action upon it cannot be commenced until the next day.

*Kennedy v. Thomas*, [1894] 2 Q.B. 759, followed.

*Sinclair v. Robson*, (1858) 16 U.C.R. 211, not followed.

*Dictum* of RICHARDS, J., in *Keddy v. Morden*, (1905) 15 M.R. at p. 632, overruled.

2. The holder of an instrument of the kind usually called a lien note, payable "on or before the first day of November, 1904," could not have brought an action upon it until 2nd November, and, therefore, the last day of the six years allowed by the Statute of Limitations for the bringing of the action would be 1st November, 1910, and an action on the note commenced on that date is not barred by the statute.

DECIDED: 9th June, 1913.

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## COUNTY Court appeal.

Statement. This was an action upon a "lien note" of which the following is a copy:

"Neepawa, Manitoba, April 22, 1904.

No.

\$60.00

On or before the First day of November 1904 for value received I promise to pay to William Willoughby or Order the sum of Sixty .....Dollars at the Union Bank of Canada, here, with Interest at 8 per cent. per annum till due, and 12 per cent. per annum after due till paid. Given for one Black mare and one osring mare in foal.

The title ownership and right to the possession of the property for which this note is given shall remain at my own risk in William Willoughby until this note or any renewal thereof is fully paid with interest and if I make default in payment of this, or any other note made in his favor, or should I sell or dispose of or mortgage my real or personal property or if William Willoughby should consider this note insecure, he has full power to declare this and all notes made by me in his favor, due and payable at this time and he may take possession of the property and hold it until this note is paid, or sell the said property at public or private sale, the proceeds thereof to be applied in reducing the amount unpaid thereon; and the holder hereof, notwithstanding such taking possession or sale, shall have thereafter the right to proceed against me and recover, and I hereby agree to pay the balance then found to be due hereon.

P.O.

Sec.

Tp. Rg.

(Sgd.) Wm. Wainwright."

Witness

Minnedosa.

The suit was commenced on the 1st day of November, 1910. The defendant pleaded the Statute of Limitations. The sole question was whether the statute began to run as against the plaintiff on the 1st or on the 2nd day of November, 1904, and whether the defendant had all of the 1st day of November to make payment.

Judge Ryan gave judgment for the defendant, holding that the statute began to run on the 1st November, 1904, on the authority of *Keddy v. Morden*, 15 M.R. 629.

Plaintiff appealed.

*W. S. Morrissey* for plaintiff, appellant, cited *Keddy v. Morden*, 15 M.R. 629; *Bank of Hamilton v. Gillies*,

12 M.R. 495; *Edgar v. Magee*, 1 O.R. 287; *Kennedy v. Thomas*, [1894] 2 Q.B. 759; *Westaway v. Stewart*, 1 Sask. 200, and *Hardy v. Ryle*, 9 B. & C. 603. 1913  
Argument.

*S. H. McKay* for defendant, respondent, cited *Sinclair v. Robson*, 16 U.C.R. 211, 214.

RICHARDS, J.A. This action is on an instrument of the kind usually called lien notes, by which the defendant promised to pay to the plaintiff "On or before the 1st day of November, 1904," sixty dollars at a certain bank, with certain interest. Apparently nothing was ever paid.

On 1st November, 1910, the plaintiff brought his action in the County Court of Neepawa. The defendant pleaded the Statute of Limitations. The learned trial Judge gave judgment for the defendant, following an expression used, I regret to say, by myself in *Keddy v. Morden*, 15 M.R. at p. 632, where I stated with regard to an instrument, similar to the one now in question, and which became due on 1st December, 1892, that the remedy on it would be barred by the Statute of Limitations on the expiry of the last day of November, 1898.

I think that, in so stating, I must have had in mind the decision in *Sinclair v. Robson*, 16 U.C.R. 211, where it was held that, in the case of a dishonored promissory note payable at a bank, the holder was entitled to sue out process on the due date, after close of the business hours of the bank where the note was payable.

The plaintiff's counsel in the present case admitted, on the argument, that under *Bank of Hamilton v. Gillies*, 12 M.R. 495, the instrument now sued on was not a promissory note, so that the defendant was not, when it came due, entitled to days of grace. That question is, therefore, not before us. He, however, disputed the correctness of the decision in *Sinclair v. Robson*, and of the above dictum in *Keddy v. Morden*, and argued that the law was settled by *Kennedy v. Thomas*, [1894] 2 Q.B. 759.

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In *Kennedy v. Thomas* a bill of exchange, payable at a bank, was presented there for payment on the third day of grace at about 2.30 p.m. Payment was refused and, at a later hour on the same day, the plaintiff issued his writ. It was held by the Court of Appeal in England (Lindley, Lopes and Davey, L.JJ.) that the plaintiff had no right to bring his action until after the whole of the third day of grace had expired.

In considering whether the acceptor was entitled to the whole period up to the end of the third day of grace, in which to pay the bill, Lindley, L.J., says: "*Prima facie*, I should have thought it plain that according to ordinary principles of law he was so entitled."

Lopes, L.J., says, on the same point: "If he has not the whole of the third day during which to meet the bill, I cannot see how he gets three days of grace." Then he quotes from *Byles on Bills*, 14th Edition at p. 299 (referring to the third day of grace). "The acceptor has the whole of that day within which to make payment; and, though he should, in the course of that day, refuse payment, which refusal entitles the holder to give notice of dishonor, yet, if he subsequently on the same day makes payment, the payment is good, and the notice of dishonor becomes of no avail." Mr. Justice Lopes adds: "In my opinion the true view is that the acceptor is entitled to the full benefit of the three days of grace."

Davey, L.J., says that, in his opinion, "No right of action accrues to the holder of the bill until the expiration of the third day of grace."

In *Sinclair v. Robson*, the learned Judges thought that the fact that, by the then law of Upper Canada, all protests of promissory notes for non-payment might be made at any time after three o'clock in the afternoon of the day of dishonor entitled the holders to bring action at once after that hour.

It seems to me that, in so viewing the matter, they

confused the right to give notice of dishonor with the right to bring action. The former was a special statutory privilege given for the convenience of banks and other holders of negotiable paper. But it surely went no further than, on its face, it purported to go. To add to it a right to anticipate the right of action by one day, is going further than I think could have been intended.

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In *Sinclair v. Robson*, Robinson, C.J., distinguishes *Wells v. Giles*, 10 W.R. 295, which is the case followed in *Kennedy v. Thomas*, by pointing out that it was an action on an inland bill, which "could not be protested for non-payment till after the three days' grace \* \* \* and therefore could not be put in suit before, because, according to the statute, the party could not be in default before."

With every deference I think the learned Chief Justice, in stating the above, was confusing the right of action with remedies merely meant to hold the liability of parties other than the acceptor.

*Sinclair v. Robson* was considered in *Edgar v. Magee*, 1 O.R. 287, where the Judges differed as to its being an authority.

But, even if it were such, in so far as it turned on whether the protesting a note on the due date did, or did not, justify its holder in bringing his action on that date, we could not hold it as an authority here, as the instrument sued on is admitted not to be a promissory note, and is therefore not liable to protest.

It is true that in *Sinclair v. Robson* the learned Chief Justice held that, even without the statute as to protests, the plaintiff was entitled to bring his action on the third day of grace, after the close of the business hours of the bank where the note was payable. He says as to that: "The defendant engaged to pay it at that place on that day and, if the bank hours were suffered to elapse without

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his paying it, he certainly was in default, and was therefore, as I think, liable to an action for his default."

I do not gather from the report that the other Judges concurred in that view, and I cannot bring myself to think that the fact, that the bank hours closed at three p.m., affected the matter any more than the fact, that a merchant's business closed daily at that hour, would affect the right to sue on a note made payable at his place of business.

With the utmost respect the decision in *Kennedy v. Thomas* seems to me to be more logical and reasonable than that in *Sinclair v. Robson*, and I think this Court should follow it. If I am right in that, then the defendant had all of 1st November, 1904, within which to pay, and the plaintiff had no power to sue till the 2nd. If that is correct, then the six years began to run on the last named date, and would not expire till the end of the day on which the action was brought, 1st November, 1910.

I regret the *dictum* in *Keddy v. Morden*, which the learned trial Judge followed. The action there was not begun till 3rd December, 1898, so that it was immaterial whether the six years did, or did not include the 1st of December, and the *dictum* was purely *obiter*.

I would allow the appeal with costs, and set aside the judgment for the defendant in the Court below, and enter judgment there for the plaintiff for \$88.36 with costs.

HAGGART, J.A. I do not think the case of *Keddy v. Morden*, 15 M.R. 629, can be an authority. The learned Judge there was considering the question whether such a document as the one referred to in this case, containing such stipulations, was a promissory note or not, and would have the three days of grace. For the disposal of that case it was not necessary to make any finding on this point. The statement relied on is *obiter dictum*.

*Sinclair v. Robson*, 16 U.C.R. 211, was cited by the defendant. There it was held that suit might be commenced after banking hours on the day the note matured, because by statute protest was allowed after three o'clock and because the defendant was then in default when banking hours were passed and the note was then overdue.

*Kennedy v. Thomas*, [1894] 2 Q.B. 759, a decision of the Court of Appeal, seems to settle the law upon this point, in which it was held that, when payment of a bill of exchange is refused by the acceptor at any time on the last day of grace, the holder, though he is entitled at once to give notice of dishonor to the drawer and endorsers, has no cause of action against either the acceptor or the other parties to the bill until the expiration of that day, and that an action brought by the holder against the acceptor on the last day of grace must be dismissed as premature.

*Wells v. Giles*, 10 W.R. 295, 209, is a clear decision that an action on a dishonored bill cannot be commenced on the third day of grace, and was followed in *Kennedy v. Thomas*. See *Westaway v. Stewart*, 8 W.L.R. 908; *MacLaren on Bills and Notes*; *Halsbury*, vol. 19, p. 45; *Roscoe, N.P.* (1907) 678.

The appeal should be allowed with costs, and the judgment of the trial Judge set aside and judgment entered for the plaintiff in the Court below for the amount of the plaintiff's claim, \$88.36, with costs.

HOWELL, C.J.M., PERDUE and CAMERON, J.J.A. concurred.

*Appeal allowed.*

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## FRANKEL v. CITY OF WINNIPEG.

Before GALT, J.

*Mandamus—Practice—Motion for mandamus—Building by-law—Winnipeg Charter, s. 703 (28).*

Under Rules 875 to 888 of the King's Bench Act, although a Judge makes an order, under Rule 879, permitting an application for a *mandamus* to be made by motion without commencing an action, the former practice of applying in the name of the Sovereign *ex rel.* the applicant has not been done away with, and a motion by the applicant direct is irregular.

An applicant for a *mandamus* should have a legal right to the performance of some duty of a public and not merely a private character, and there must be no other adequate legal remedy.

The applicants had not complied with the building by-law of the City, passed under par. (28) of s. 703 of the Charter, which required the filing of a written application for the building permit which they asked for and the pre-payment of the prescribed fee. They relied upon the fact that, when they applied verbally for the permit, the building inspector told them he could not issue it as he had received instructions from a committee of the City Council not to do so.

*Held*, that the applicants, seeking to enforce a strictly legal right, should have placed themselves in a position to demand it by complying strictly with the by-law, and the statement of the building inspector that he would not grant it was no excuse.

*Semble*, the applicants could not succeed because, also, the relief for which they were asking was in respect of what was a merely private right.

DECIDED: 29th November, 1912.

Statement. APPLICATION for a *mandamus* to compel the City of Winnipeg, or the building inspector, to issue a permit for the building of an apartment block.

A. E. Hoskin, K.C., for plaintiffs cited *Re Hobbs and Toronto*, 4 O.W.N. 31; *Cook v. Hainsworth*, [1896] 2 Q.B. 85, 92; *Reg. v. Mayor, etc., of Newcastle*, 60 L.T. 963; *Queen v. Tynemouth*, [1896] 2 Q.B. 219, 451; *Re Taylor and Winnipeg*, 12 M.R. 18; *The King v. Nunn*, 15 M.R. 288, and *Watt v. Drysdale*, 17 M.R. 15.

T. A. Hunt, K.C., for the City of Winnipeg cited *Queen v. Registrar of Companies*, 21 Q.B.D. 131; *Holmes v. Brown*, 18 M.R. 48; *Re Marter and Gravenhurst*, 18 O.R. 243; *Pasmore v. Oswaldtwistle*, [1898]



A.C. 387; *The Queen v. Wigan*, 1 A.C. 611, and *Owen v. Liverpool, etc., Ry. Co.*, 21 L.J.Q.B. 284.

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Argument.

GALT, J. This is an application for a *mandamus*. The proceedings are of a somewhat unusual nature. On October 10, 1912, Frank Frankel and Maurice Frankel obtained an order from Mr. Justice Macdonald, granting them leave to proceed with an application for *mandamus* against the City of Winnipeg and E. H. Rodgers, building inspector thereof, commanding and requiring the City of Winnipeg and the said building inspector, otherwise called inspector of buildings, to issue to the said Frank Frankel and Maurice Frankel, or to the said Maurice Frankel, a certificate required under, and provided for in, the by-laws of the City of Winnipeg in such case made and provided, in order that said Frank Frankel and Maurice Frankel or the said Maurice Frankel might commence the erection of a house, building or apartment block upon Lot 52, according to a plan of part of Lot 86, according to the Dominion Government Survey of the Parish of St. James, registered in the Winnipeg Land Titles Office, as Plan No. 1352, excepting out of said lot the most easterly 13 feet in depth thereof, according to the plans and specifications for such building submitted to the said building inspector, by way of motion, notice of which motion was to be given in the ordinary manner to the City of Winnipeg and the said building inspector, the said motion to be prosecuted upon affidavit or other evidence.

Pursuant to said order a notice of motion was served upon the City of Winnipeg and E. H. Rodgers, and affidavits were read by both parties in support of their respective contentions.

No action has been commenced by the applicants, and in the absence of pleadings I am left to spell out the rights of the parties as best I can from their affidavits and arguments. It appears that shortly prior to October,

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1912, the applicants prepared plans of their proposed building and submitted the same to the building inspector. The applicants say that the building inspector approved of the plans on a Saturday and promised to issue the requisite permit on the following Monday.

On the following Monday the applicants say they attended on the said building inspector and requested the issue of the said permit, when the inspector stated to them that he had been directed by the Fire, Water and Light Committee not to issue any further permits, and he refused to grant the same, although he stated that the plans and specifications were perfectly satisfactory in every respect, and the applicants were given to understand that the refusal was on account of some dispute between the City and certain residents of Armstrong's Point, with reference to a sewer on Assiniboine Avenue, etc.

In a subsequent affidavit, the applicant Frank Frankel says that on the 2nd day of November, 1912, (many days after service of the notice of motion herein), he attended on the building inspector and delivered a letter to him, and offered to pay him whatever fee was required for the issue of a permit and then tendered him the money, which he refused to accept; and that he also offered and requested to be allowed to sign any application or other form which the City of Winnipeg might require in connection with the issue of a building permit.

David W. Bellhouse, the applicants' architect, says that on the Monday morning referred to, when he attended at the office of the building inspector, he was ready and willing, on behalf of the applicants, to pay whatever the proper fee was for the said permit; but immediately upon his entering the office of the said building inspector the latter told him that he could not issue the permit, and had been instructed not to do so, and he (Bellhouse) did not therefore pay or tender the said Rodgers the fee.

Mr. Bellhouse's affidavit also contains the following statement:

"(3) That the only document in the nature of an application for the issuing of a building permit which, to the best of my knowledge, information and belief, is ever signed by or on behalf of the applicant for such permit is a document which is prepared by or in the office of the building inspector after the plans and specifications have been approved; such document containing general particulars of the said building and the said document is signed by or on behalf of the applicant at the actual time of the issue of the permit, and, in this case, the building inspector had all the necessary information for filling in the said document and the applicants were ready and willing to sign the same, and I was ready and willing to sign the same on their behalf."

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The building inspector himself says that neither the said Frank Frankel nor Maurice Frankel, nor either of them, has paid or offered to pay him any fee in respect of, or for, a building permit for said building, and he points out that the permit fee is fixed by a sliding scale set forth in the Building By-law, and that Frankel could not tell him the cost of the proposed building.

The inspector also denies the receipt of any written application for a permit, except a letter from the applicants' solicitors, which says nothing as to cost.

From the affidavits and exhibits I gather that the applicants duly submitted their plans, but omitted to make any written application for a permit, and did not tender any definite fee for such permit, apparently considering that the inspector's refusal to grant a permit rendered any further application or tender useless.

The Winnipeg Charter, as amended by the statutes of Manitoba for 1906, c. 95, s. 7, provides, under the heading "By-Laws."

"703. The City may pass by-laws not inconsistent with the provisions of any Dominion or Provincial statute,

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"(28) for regulating the erection of buildings, verandahs and other structures external to buildings," etc.

On April 29, 1907, the City of Winnipeg passed By-Law No. 4283: "to regulate the construction, alteration, repair, removal and inspection of buildings in the City of Winnipeg, and to prevent accidents by fire."

The following extracts from the by-law relate to the matters in dispute upon this motion:

"Section 1. There shall be in the City of Winnipeg a Department to be called the Department for the Inspection of Buildings, which shall be charged with the enforcement of the provisions of this By-law as hereby enacted for the survey and inspection of buildings and the protection of the same against fire or accident.

"2. The staff of said Department shall consist of a chief, to be known as the Inspector of Buildings, and as many assistant Inspectors as may be found to be necessary from time to time.

"7. It shall be the duties of the Inspector, as Chief of his department, to issue permits for the erection, enlarging or alteration of buildings, in accordance with the provisions of this By-law; keep a record of the same, with a description of the construction, sanitary appliances, heating apparatus, electric apparatus, elevators, fire escapes, and all matters relating to the construction or alteration of buildings in the City.

"9. It shall be the duty of the Inspector, on receipt of an application for a permit, accompanied by the plans and specifications for the proposed building, or alteration, to carefully examine the same, and ascertain if the supports, beams, and construction of the proposed building are properly shown in said plans and described in the said specifications, and that they are in accordance with the provisions of this By-law. If the Inspector is satisfied that they conform to this By-law he shall, within a period of three days from the date of application, issue a permit as hereafter provided for. If they do not conform to this By-law, he shall refuse to issue such permit.

"20. If the Inspector of Buildings for the City of Winnipeg shall contrary to the provisions of this By-law permit or wilfully neglect or refuse to prevent the

erection, placing or repair or alteration of any building or any erection, wholly or in part put up, erected, repaired or altered or placed contrary to the provisions of this By-law, he shall be liable to the penalties of this By-law.

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"21. Should any question arise between the Inspector and the owner or his legal representatives, or should the said party object to any order or decision of the Inspector, he or they shall have the right within three days after the giving of such order or decision to appeal from the same to the Board of Appeal hereafter referred to.

"24. The Board of Appeal shall consist of three members of the City Council. The appointment of said Board of Appeal to be made annually by the City Council.

"35. There shall be levied and collected from every applicant for a building permit, whether the application is for a new building or for repairs, alterations or additions to a building, when the cost of such building, repairs, alterations, or additions, does not exceed the sum of \$500, the fee shall be 50c.; over \$500, and not exceeding \$1,000, \$1; over \$1,000, and not exceeding \$5,000, \$2. With an extra charge of 50c. for each additional \$5,000 or fractional part thereof."

Under paragraph 35, the fee for building permits is fixed on a sliding scale, depending upon the cost of the building, repairs, alterations or additions.

A portion of the material read upon the motion on behalf of the respondents went to show that the applicants were not acting *bona fide* in respect of their building, but were following out a system of selecting lots of land in portions of the City where high class residences prevailed, and threatening to build apartment blocks on such lots with a view to being bought out by the residents of the neighborhood. Such a course of conduct might well be termed reprehensible from a strictly moral point of view; but in this case the applicants are asserting a purely legal right, and their motives cannot be inquired into. On the other hand, the onus of establishing their legal position necessarily rests upon the applicants.

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The first point which arises for decision relates to the procedure adopted by the applicants.

The rules relating to the granting of a *mandamus* are Rules Nos. 875 to 888 inclusive. Prior to these rules the English procedure in force in Manitoba provided for two separate kinds of *mandamus*: firstly, the prerogative writ, which did not require the bringing of any action; and, secondly, a *mandamus* to be obtained by action pursuant to the Common Law Procedure Act, 1854, subsequently amended by the Judicature Act.

No argument was addressed to me with reference to these separate forms of *mandamus*, as the parties seemed to consider that the order made by Macdonald, J., was conclusive as to the right of the applicants to frame their motion as they have done.

I find it difficult to give effect to the procedure adopted by the applicants for the following reason.

Rule 875 enables the plaintiff to issue a statement of claim asking for a *mandamus* commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested. Rule 877 provides that no writ of *mandamus* shall hereafter be issued in an action; but a *mandamus* shall be by a judgment or order, which shall have the same effect as a writ of *mandamus* formerly had. Rule 879 provides that nothing in the preceding rules contained shall take away the jurisdiction of the Court to grant orders of *mandamus*, nor shall any order of *mandamus* issued be invalid by reason of the right of the prosecutor to proceed by action for *mandamus*; but in all cases the claim for a *mandamus* shall be proceeded with by action under the preceding rules, unless leave is granted by the Court or a Judge to proceed otherwise.

Rule 885 provides that, in all cases in which application for *mandamus* is made by motion, the application for the said order may be made to the Court on affidavit upon leave being granted as provided in rule 879, and

upon notice in the ordinary manner to any person who may, in the opinion of the Court or Judge, be affected by the order, if made.

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The draftsman of the above rules appears to have had a vague idea that the remedy previously given by prerogative writ of *mandamus* was to be preserved in our procedure, but modified by enabling the applicant to move by way of notice of motion in lieu of the usual order *nisi*, and to obtain the requisite relief by an order instead of by the usual writ.

The two modes of relief, widely differing in their incidents and applicability, are confused in our present Rules.

Under the former practice the proper procedure was to apply to the Court for an order *nisi* in the name of the Sovereign *ex relatione* the applicant against the defendant. An instance of this may be seen in *Reg. ex rel. Pacaud v. Dubord*, 3 M.R. 15. I see no reason why the parties to a notice of motion (if that be now the proper method) should not be the same as under the former procedure by way of order *nisi*. That is to say, the motion should be on behalf of the Sovereign *ex rel.* the prosecutor. The motion as framed is, therefore, improper. Then, again, the applicant must have a legal right to the performance of some duty of a public and not merely a private character, and there must be no other effective lawful method of enforcing the right. See *Encyc. Laws of England*, vol. 8, pp. 526, 529, 546. In the present case the applicants are asking for relief in respect of what appears to be a merely private right.

It is just possible that the applicants read Rule 879 as entitling them, with the leave of the Court or a Judge, to serve a notice of motion and commence an action at some later stage. I am not aware of any practice which permits of such a proceeding, and, inasmuch as no action was commenced upon which the notice of motion could be

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There is an additional point which was carefully argued before me, which seems equally fatal to the application.

The applicants are enforcing a strictly legal right and the onus is upon them to show that they are in all respects clearly entitled to the permit in question.

Paragraph 9 of the Building by-law provides that it shall be the duty of the Inspector on receipt of an application for a permit, accompanied by the plans and specifications for the proposed building or alterations, carefully to examine the same, etc. It appears to me that the words "on receipt of an application for a permit" clearly contemplate a written application, which, it is admitted, was never handed in.

Then paragraph 35 provides that there shall be levied and collected from each applicant for a building permit a fee, based upon the sliding scale therein set out. The application for a permit would naturally contain a statement of the proposed cost of the building. But, whether that be so or not, the Building Inspector states in one of his affidavits that the applicant could not tell him the cost of the proposed building.

The applicants answer this objection as to the omission to furnish a written application and the proper fee therefor by stating that, when they went, with their architect, to the office of the Building Inspector on the Monday morning, he refused to grant a permit, and gave a different reason for his refusal, namely, that he had been so instructed by the Fire, Water and Light Committee. If this were a case of contract, there is no doubt the applicants would have been freed from the obligation to comply with any conditions precedent by reason of the refusal of the opposite party to perform his part of the contract; but I was not referred to any authority, nor



have I been able to find any, in which this rule of law has been held applicable to wrongs independent of contract. Nothing could have been easier than for the applicants to place themselves in a position to demand their legal right by tendering a written application with all its necessary contents together with the proper permit fee calculated in accordance with paragraph 35. This they did not do, but launched their motion with a simple offer to sign any application and pay any fee which might be necessary.

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A question was raised on behalf of the applicants as to whether any fee was properly chargeable by the Building Inspector for the permit. The fees set forth in paragraph 35 of the Building by-law appear to be only moderate fees, probably fixed with a view to covering the cost of issuing the permits and of inspecting and regulating buildings in the City. The right of the City to such a fee is strongly supported by the *City of Montreal v. Walker*, reported in *Montreal Law Reports*, 1 Q.B. 469; and, in the absence of any conflicting authority in our own courts, I am content to follow it.

Upon the whole case I think the language of the Chief Justice of this Court, expressed in *Holmes v. Brown*, 18 M.R. 48, is, *mutatis mutandis*, appropriate. "If the plaintiffs have a legal right to the payment of the moneys in question, they have an adequate remedy therefor by action against the town. If they have not a legal right to this payment, then they have no right to a *mandamus*."

The motion must be dismissed with costs.

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## COURT OF APPEAL.

RICHARDSON &amp; SONS, LTD. v. BEAMISH.

Before HOWELL, C.J.M., PERDUE and CAMERON, J.J.A.

*Principal and agent—Commission broker—Liability of principal on contracts entered into by agent in his own name—Privity of contract—Option dealings on Grain Exchange—Purchases and sales on margins for future delivery—Gambling in grain—Criminal Code, s. 231.*

The defendant, a farmer, employed the plaintiffs, members of the Winnipeg Grain Exchange, to buy and sell for him on the Exchange on commission, at different times, quantities of grain for future delivery. The transactions were what is known as dealing in options and were speculative on the defendant's part. They were carried out in accordance with the rules, customs and usages of the Exchange and the defendant knew and intended that they should be so carried out. He was so informed on every "bought" and "sold" note he received. According to those rules, customs and usages the plaintiffs became the principals in every purchase and sale for the defendant, and bought and sold in their own name to other members of the Exchange, reporting every transaction to the defendant without giving the name of the other party to the contract.

To facilitate the settlement of the numerous dealings between the different members of the Exchange, there was a Clearing Association closely connected with it, upon which all their transactions were cleared every day by a process of set-off resulting in the different members becoming debtors or creditors of and settling with the Clearing Association for the net balances, instead of settling all matters between one another; but it did not appear that this practice was known to the defendant.

From time to time defendant placed money in plaintiffs' hands as margin to protect them against losses on his account. The plaintiffs sued for the balance due them in respect of liabilities so assumed for the defendant and for the amount of their commissions on the different transactions.

*Held*, (HOWELL, C.J.M., dissenting).

1. The plaintiffs were entitled to recover the amount of their account, although they had not in any case established any privity of contract between the defendant and the buyer or seller of the grain. The defendant was bound by the rules, customs and usages of the Exchange on which he was dealing through the plaintiffs, including any which were not known to him, provided they were not unreasonable, and the practice of clearing all transactions through the Clearing Association was a reasonable one which was not prejudicial to him in any way, and which was binding upon him as one of such rules, customs, or usages.

*Bowstead on Agency*, 5th ed. p. 89 ; *Murphy v. Butler*, (1907) 18 M.R. 111, and *Van Dusen-Harrington Co. v. Jungeblut*, (1899) 77 N.W.R. 970, followed.

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*Robinson v. Mollett*, (1875) L.R. 7 H.L. 802, distinguished.

2. Although the defendant did not expect that he would have to make or receive the actual delivery of the grain sold or bought, and intended to and did buy and sell as against his sales and purchases to protect himself, yet every transaction was a real and not a fictitious one, and the dealings in question were not gaming transactions within the meaning of section 231 of the Criminal Code and were not made illegal thereby. That section is only intended to apply to what are known as "bucket shop" dealings, that is, bets against the rise or fall of stocks or commodities when the pretended transactions of purchase or sale are fictitious.

*Pearson v. Carpenter*, (1904) 35 S.C.R. 380 ; *Forget v. Ostigny*, [1895] A.C. 318, and *Clews v. Jamieson*, (1901) 182 U.S. 489, followed.

DECIDED: June 9th, 1913.

THE plaintiff was a corporation carrying on business in Winnipeg as broker and was a member of the Winnipeg Grain Exchange. The defendant was a farmer residing at Elva in Manitoba. Statement

It was alleged in the statement of claim that the defendant, as principal, instructed the plaintiff, as agent, to buy and sell certain quantities of wheat and flax, in accordance with the rules, regulations and customs of the Winnipeg Grain Exchange. On these transactions the plaintiff received from the defendant certain sums of money in cash and after crediting him with these it was alleged that there was a balance due of \$1,199.58. Numerous defences were set up by the defendant.

The action was tried before the Chief Justice of the King's Bench, who entered a verdict for the plaintiff for the above balance.

Defendant appealed.

*W. A. T. Sweatman* and *W. P. Fillmore* for defendant, appellant, cited *Irwin v. Williar*, 110 U.S.R. 499 ; *Murphy v. Butler*, 18 M.R. 114, 41 S.C.R. 618 ; *Scott v. Godfrey*, [1901] 2 K.B. 726 ; *Robinson v. Mollett*, L.R. 7 H.L. 802, 818 ; *Van Dusen-Harrington Co. v.*

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*Morton*, 15 M.R. 222; *B.C. Stock Exchange v. Irvine*, 8 B.C.R. 186; *Thacker v. Hardy*, 4 Q.B.D. 685; *In re Gieve*, [1899] 1 Q.B. 794, 803; *Forget v. Ostigny*, [1895] A.C. 318; *Johnson v. Kearley*, [1908] 2 K.B. 514, 528, and *Halsbury*, vol. 1, pp. 168, 207.

*W. M. Crighton and E. A. Cohen* for plaintiff, respondent, cited *Van Dusen v. Jungeblut*, 77 N.W.R. 970; *Irwin v. Williar*, 110 U.S.R. 499; *Clews v. Jamieson*, 182 U.S.R. 461; *Grissell v. Bristowe*, L.R. 4 C.P. 36; *Forget v. Ostigny*, [1895] A.C. 318; *Robinson v. Mollett*, L.R. 7 H.L. 802; *Pearson v. Carpenter*, 35 S.C.R. 380, and *Thacker v. Hardy*, 4 Q.B.D. 685.

HOWELL, C.J.M. I have the misfortune to differ from the majority of the Court in this matter, and shall briefly give my reasons.

The plaintiffs' claim, as set forth in the pleadings, is that they were employed as agents, or brokers, for the defendant to enter into contracts for the purchase and sale of grain on the Winnipeg Grain Exchange, of which the plaintiffs were members, and that, acting as such agents, they entered into many such contracts with third parties and, according to the customs and usages of the Exchange, the plaintiffs thereby became personally liable and were called upon to pay and did pay moneys for the recovery of which this action is brought.

There is an auxiliary company working with the Grain Exchange, which the members of the Exchange may use in their dealings, called and known as the Clearing House, the workings of which are set out in the evidence. The plaintiffs and all the third parties with whom they dealt in this matter settled all their transactions with and through the clearing house. To illustrate how this was done, the first transaction was fully gone into. At the end of the day, 4th January, the plaintiffs were "long" to the clearing house 163,000 bushels of wheat—that is, they had in their account with the clearing house

163,000 bushels more of option purchases than of sales. On the 5th of January they sold for the defendant 5,000 bushels, and purchased for some one else, or for themselves, 3,000 bushels, and at the end of the day the plaintiffs have added to their "long" account 3,000 bushels and deducted from it 5,000 bushels, and so at the end of the day the plaintiffs are in the books of the clearing house "long" 161,000 bushels. At the end of the day the clearing house took over this 5,000 bushels transaction, and as the agreement to sell entered into by the plaintiffs was at  $108\frac{7}{8}$ , and as the market price at the end of the day was only 108, the clearing house gave the plaintiffs credit for \$31.25 on this account and reduced thereby a very large debt on their "long" account, because of the fall in price.

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The sale of the 5,000 was made to one Bingham, and he was treated conversely by the clearing house, and so this purchase and sale between the plaintiffs and Bingham was wiped out because, by the rules of the Exchange, each of these parties must trade as a principal and therefore can enter into any agreement for the disposal of their agreements which they may agree upon.

On this particular January 5th, although the plaintiffs received from the clearing house the credit for the transaction for the defendant above set forth, they had to hand over to the clearing house \$1,552.50, because of their heavy "long" account in wheat and a couple of other small grain transactions.

There is no pretence that between Bingham and the plaintiffs any money was either paid or received in this transaction. The only entry of it is on a card of each party and that card is taken by the clearing house.

The plaintiffs and Bingham both knew, when the contract was entered into, that the undisclosed principal, if any, would be cut out at the close of the day, and that the transaction would become at once merely a debt or

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credit entry of each in the clearing house. It was just the same to the plaintiffs as a purchase by themselves, it merely reduced their "long" in the clearing house.

The defendant has lost his contract with Bingham, if he ever had one, and this the plaintiffs intended from the first, for they intended that the contract should be one which would be manipulated between them and the clearing house. The defendant has no remedy against the clearing house, for the agreement between the plaintiffs and the clearing house was that all matters were to be merely a sort of set-off of accounts and the plaintiffs were to be treated always as principal. There is nothing to show how much of the various clearing house matters are the plaintiffs' own private contracts.

No doubt the plaintiffs have been compelled to account to the clearing house for all the transactions entered into on behalf of the defendant, and to do this they bought or sold and thereby adjusted their "long" or "short" accounts with the clearing house, but those sales or purchases were all adjusted by moneys paid to or received from the clearing house in their account and no payments were made to or received from third parties.

From the allegations in the statement of claim I would expect the plaintiffs to show that they performed the ordinary duty of a broker by establishing a privity of contract between two principals, as laid down in *Robinson v. Mollett*, L.R. 7 H.L. 802. This duty might be performed by the custom of a market which permitted one purchase or one sale for several customers so long as there still remained a principal for the broker's client, as in *Scott v. Godfrey*, [1901] 2 K.B. 736. It might also be performed by buying a portion only from one party so long as privity of contract is established, as in *Levitt v. Hamblet*, [1901] 2 K.B. 53. In the case of *Johnson v. Kearley*, [1908] 2 K.B. at 528, Fletcher Moulton, L.J., says: "The office of broker is to make privity of contract

between two principals," and this case also illustrates the jealous care the Court takes in protecting a client in his dealings with a broker.

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It is argued, however, that the rules and customs of the Grain Exchange permitted the course taken in this case, because the defendant knew the dealings were to be on that Exchange and knew the plaintiffs were members thereof. It seems clear, as a matter of law, that where these rules and customs are reasonable the defendant is bound by them.

It is clear from the evidence that the Grain Exchange had rules by which these transactions could have been carried out so that there would in each case have been a principal to whom the defendant could have looked for the enforcement or performance of the contracts. Instead of taking this course the plaintiffs acted through the associate corporation, the clearing house, which is apparently commonly used by members of the Exchange.

The plaintiffs usually notified the defendant that they had bought or sold "according to the rules and customs of the Exchange;" but, except these notices and their long dealings, there was no evidence that the defendant knew anything about the rules, and there is not the slightest evidence that he knew anything about the clearing house.

If the rules or customs are unreasonable, the defendant must have actual notice of them and I take it must really have agreed to contract in this unreasonable way: *Perry v. Barnett*, 15 Q.B.D. 388, and *Blackburn v. Mason*, 68 L.T. 510. The latter is a case like the present one where brokers had agreed to set off differences the same as the plaintiffs in this case with the clearing house.

The bargain or arrangement made between the plaintiffs and the clearing house is one for members of the Exchange only. It might be called a domestic arrangement, and the defendant cannot take any benefit or incur

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any liability under it: *Ponsolle v. Webber*, [1908] 1 Ch. 256.

The plaintiffs in this case, by acting through the clearing house, did not procure privity of contract with a principal, and if the rules of the Exchange permit this they are unreasonable and I see no evidence whatever that the defendant had notice of it.

A transaction similar to this one was supported in the case of *Van Dusen v. Jungeblut*, 77 N.W. Rep. 970, being a decision of the Court of Minnesota. In that case the Judge apparently held the client bound by the rule although he knew little about it, and further that, because of the clearing house, the rule in *Robinson v. Mollett* does not apply. This decision does not appeal to me, and I do not like to follow it. In the American case of *Irwin v. Williar*, 110 U.S.R. 515, the law of *Robinson v. Mollett* is followed and, in a case not unlike the present one, the broker was refused relief.

The more recent American case of *Clews v. Jamieson*, 182 U.S.R. 461, seems to show the necessity of there being a principal for the client to look to even where there is a clearing house transaction; at 482 the Judge shows that Jamieson & Co., one of the defendants therein, by a sale from the plaintiff's agent, became a principal.

Lord Macnaghten in the House of Lords in *May v. Angeli*, 14 T.L.R. at 554, refers to the necessity of establishing privity of contract, and he discusses *Robinson v. Mollett* in a way I think inconsistent with the American case above referred to. See also *Bewes on Stock Exchange Law*, 68, 69 and 84.

The plaintiffs have not alleged in their statement of claim, nor have they proved, the contract made with the defendant to be one whereby they were really to be the buyers or sellers and that there was to be no principal with whom the defendant would have privity of contract,



thereby really changing the whole nature of the contract alleged in the pleadings.

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Upon this ground I think the plaintiffs have not made out their case against the defendant.

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I have to differ with the majority of the Court also on the defence of illegality.

If the plaintiffs are entitled to recover, it is because they have been called upon by the clearing house to pay differences between various purchases and sales, and that the defendant agreed to indemnify them as to these differences in market values. The various accounts between the clearing house and the plaintiffs filed in evidence, and the various cheques also filed, show merely dealings in differences in market prices.

The various letters and telegrams between the parties show, to my mind, that the defendant intended merely to gamble in future prices and that the plaintiffs were aware of this and were trying to assist him. In the accounts rendered by the plaintiffs to the defendant he is merely charged or credited with differences in market values of grain at different dates.

In the letters and telegrams the plaintiffs "suggest selling five" (5000 bushels) "May must be getting pretty near the top." "We thought you would \* \* take what profits are offering." They advise to sell and "get in lower down." They advise putting in "stop orders" to prevent further loss. "We rather regret you did not take the short side when here, it certainly would have been a good scalp." "We thought it would be better for you to take your profits as you were figuring on a 3-cent margin of profits." "We have your order before us to buy or sell 5000 bus."—"thought it well to buy 5 on your account \* \* will be surprised if we are not able to pull you a cent or so out of this in pretty short order." These expressions are taken at random from the plaintiffs' letters. The cheques which the plaintiffs put in showing

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their payments to the clearing house, for the recovery of portions of which this action is brought, are cheques representing the differences in value of grain at different dates. The defendant in his letters to the plaintiffs shows his intention to gamble merely in differences of prices. He states "You might buy say 5000 May, and then should she shoot up to 1.07 or 1.08, why sell." "I wired you this morning to buy another 5000 May at 1.05 or less if possible, and if it goes to 1.07 $\frac{1}{2}$  put a stop bid on both lots, but should the market fall away suddenly, try and sell both lots at buying price, and we can get in again." "What is best side to be on?" "Had I sold at 107 I could by this have had two small profits." "This May wheat keeps flirting and she won't stand down and boom and allow a fellow to make a little." "This wheat proposition beats horse racing for you never can tell." "You might wire me at any time you think we should have a chance to buy or sell and drop in again for May, July or September." "If you think the market right at any time for either the oats or wheat, short or long, you have my authority to place me 5000 of either." "You will kindly keep in mind my open order for a 5000 bus. buy or sell of option wheat or oats." Throughout the volume of correspondence, it seems to me certain that the parties intended only to deal in differences.

Cases arising under the English Wager and Gaming Act of 8 and 9 Vic., and the Act of 1892, do not much assist because the betting is not made unlawful, the contracts merely are not enforceable.

In *Thacker v. Hardy*, 4 Q.B.D 685, the plaintiff was required, as in this case, to enter into a contract of purchase and he was held entitled to recover because a wager is not an unlawful transaction, but Lindley, J., at p. 687, says:

"Now, if gaming and wagering were illegal, I should be of opinion that the illegality of the transactions in

which the plaintiff and the defendant were engaged would have tainted, as between themselves, whatever the plaintiff had done in furtherance of their illegal designs, and would have precluded him from claiming, in a court of law, any indemnity from the defendant in respect of the liabilities he had incurred: *Cannan v. Bryce*, 3 B. & Ald. 179; *McKinnell v. Robinson*, 3 M. & W. 434; *Lyne v. Siesfield*, 1 H. & N. 278. But it has been held that, although gaming and wagering contracts cannot be enforced, they are not illegal. *Fitch v. Jones*, 5 E. & B. 238, is plain to that effect. Money paid in discharge of a bet is a good consideration for a bill of exchange: *Oulds v. Harrison*, 10 Ex. 572; and, if money be so paid by a plaintiff at the request of a defendant, it can be recovered by action against him: *Knight v. Cambers*, 15 C.B. 562; *Jessopp v. Lutwyche*, 10 Ex. 614; *Rosewarne v. Billing*, 15 C.B. (N.S.) 316; and it has been held that a request to pay may be inferred from an authority to bet: *Oldham v. Ramsden*, 44 L.J. (C.P.) 309. Having regard to these decisions, I cannot hold that the statute above referred to precludes the plaintiff from maintaining this action."

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In *Forget v. Ostigny*, [1895] A.C. 322, the Lord Chancellor says: "Unless there was a gaming contract between the parties to this action so that the appellant in order to make good his claim must rely on such a contract, the defence obviously fails." And again, at page 326:

"Even where a person is employed to enter into gambling contracts upon commission, it has been held by the Courts of this country that, if he makes payments in pursuance of such employment, he can recover such payments from his principal, that the implied contract of indemnity is not, in such a case, in itself a gaming or wagering contract, and is therefore not null and void."

If, at the time that case was decided, section 231 of the Criminal Code was the law, I think the result would have been different. The plaintiffs in this case, by working through the clearing house, assisted the defendant in committing a criminal act, and the useful rules and regulations of the clearing house were thus perverted.

I think the defendant, "with the intent to make gain or

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profit by the rise or fall in price" of grain, authorized the plaintiffs to make agreements purporting to be for the sale and purchase of such grain in respect of which no delivery of the grain was to be made or received, and without the *bona fide* intention to make or receive such delivery, of all of which the plaintiffs had due notice and assisted him therein and to this end made the payments, the subject matter of this suit.

I do not think that, if the plaintiffs had lent the defendant money to carry his intent into effect, it could have been recovered, and the cases of *Ex parte Pyke*, 8 Ch.D. 754, and *Re O'Shea*, [1911] 2 K.B. 981, would not have assisted him. These cases permitted the plaintiff to recover money which had been lent to the defendant to pay certain bets because betting was not unlawful.

I think the plaintiffs are not entitled to recover.

PERDUE, J.A. The plaintiffs are members of the Winnipeg Grain Exchange and carry on a business of buying and selling grain as brokers. The defendant is a farmer, residing in this Province. The action is brought to recover a sum of \$1,199.58, alleged to be due to the plaintiffs from the defendant in respect of certain transactions in grain. The defendant employed the plaintiffs as his brokers to buy and sell for him on the Winnipeg Grain Exchange, at different times, quantities of grain for future delivery. The plaintiffs did make purchases and sales of grain on the Winnipeg Grain Exchange in accordance with the instructions of the defendant. The transactions were what is known as dealing in options. The defendant, by the operations he undertook, intended to speculate in grain. Where it was sold for future delivery the expectation was that the grain dealt in would fall in price so that the defendant would be able to buy at a lower price the quantity required to fill his contract, and in this way make a profit of the difference between the selling and the buying price. In the same way, when

he bought he expected grain to rise in value and in that way make a profit when he sold.

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It is clear from the evidence, the plaintiffs followed the instructions of the defendant in all the transactions that come in question in this suit. These transactions were carried out in accordance with the rules, customs and usages of the Winnipeg Grain Exchange. The defendant knew and intended that they should be so carried out. He had known Ruttan, the plaintiff's manager, for some five or six years prior to the dealings in question and had through him previously engaged in operations of a similar character, buying and selling options. The letters written by the defendant show that he was familiar with that kind of business and was, I should judge, an experienced speculator in grain. He showed that he closely studied the prices of grain, he gave shrewd reasons for his views in regard to the expected rise or fall in the market, and used the vernacular of the regular operator on the grain exchange.

Some of the transactions in question in this suit resulted in a profit to the defendant, but the majority of them showed losses, so that, assuming the plaintiffs' claim to be legally enforceable, he became indebted to them, as his brokers, in the amount above mentioned. If the plaintiffs are entitled to recover, there is no dispute as to the amount.

The defendant's wheat transactions commenced in January, 1910, and continued until June, 1911. They were carried out by the plaintiffs for the defendant in accordance with his instructions and with his approval, although they resulted in a loss to him. He then tried speculations in flax which were also unsuccessful and in which he lost some \$875. From time to time defendant placed moneys in plaintiffs' hands as margins to protect them against losses on his account. Allowing credit for these sums, the balance due to the plaintiffs, including

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The defence put in is lengthy, but on the argument resolved itself into two grounds. The first was, shortly, that in each transaction, as defendant claimed, privity of contract was not established by the brokers between the defendant and some other party as principal, whether buyer or seller, against whom the defendant could enforce the contract. The second branch of the defence was that the transactions were contrary to section 231 of the Criminal Code, and therefore illegal.

Taking the first ground of defence, it was argued that, by reason of the manner in which the purchases and sales had been made in the Grain Exchange and carried through the Clearing Association, the only person the defendant could look to in each transaction as a contracting party would be the brokers themselves.

The Winnipeg Grain and Produce Exchange Clearing Association is a corporation distinct from the Winnipeg Grain Exchange, but is closely connected with it. The purpose of the Clearing Association is to provide means by which the transactions which take place in the Grain Exchange may be cleared, so that sales and purchases by a member or amongst the members may be set off against each other, and balances only dealt with. In this way adjustment of the vast number of transactions that take place is made much more easily. Shares in the Association can only be held by members of the Grain Exchange. The Association is, in fact, intended as an instrument by which the transactions on the Grain Exchange may be more readily and safely effected. By-law 13 of the Association provides the means by which such transactions are put through the Clearing Association. All transactions made in grain during each day must be cleared through the Association, unless otherwise agreed by the parties.

Members of the Exchange engaged in buying or selling carry for each day a card, on one side of which sales are entered and on the other side purchases. When a transaction takes place between two members each enters on his card the number of bushels, the month of delivery, the name of the opposite party, the price and the name of the person on whose behalf the transaction is made. At the close of the market on each day, every member has to report to the Clearing Association the particulars of every transaction effected by him. He has to figure all trades of the day (including all trades carried over from the previous day) to the closing market as posted. The Clearing Association then assumes the position of buyer to each seller and seller to each buyer in respect of all the transactions cleared, and the last settling price is considered as the contract price between the members and the Association. Supposing, for instance, a broker on the Exchange makes a number of sales during the day, the selling price on each sale is compared with the price at the close of the market and, if the price is lower at the close, the broker receives the difference from the Clearing Association. If the closing price is higher the broker has to pay the Clearing House the difference. The same procedure would be followed in the case of purchases by the broker. The result is that each day's transactions on the Exchange are cleared. The money difference is settled and the balance of purchase or sales, as the case may be, in the hands of each broker is carried over until the next day. The brokers are treated as principals upon the Exchange and in the clearing Association. The result is that each transaction is merged in the process of clearing. It is not destroyed, but the principal for whom the transaction was effected looks to his broker to obtain performance of it, the broker assuming his principal's obligation on the Exchange and appearing there as the principal. Each sale or purchase

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still exists but, in the process of clearing, it has been merged in the general volume of purchases and sales made on the Exchange. The broker effecting the transaction carries it with the Clearing Association as a personal obligation. To understand the position, let it be supposed that the broker made on 5th January, 1910, one sale of 5,000 bushels for May delivery and then ceased doing business. The single sale would in that case be cleared at the end of the first day and the broker would settle for the 5,000 bushels sold by him. For every bushel sold there must appear in the Clearing Association a bushel bought. The clearing at the close of the first day is not an end of the matter. The 5,000 bushels would be carried forward by the broker as a balance from day to day and would have to be cleared each day until the transaction was offset either by a purchase of the same quantity of May wheat or by actual delivery of the grain. The broker remained as a seller and the Clearing Association as a buyer of that 5000 bushels.

All the sales and purchases in question in this suit were put through the Clearing Association, and the result was that each of defendant's contracts stood as one between the plaintiffs and the Association, the plaintiffs representing the defendant as the principal in the contract. The plaintiffs carried the transactions for the defendant, and while each transaction remained open he could, through them, have delivered the grain he sold or obtained the grain he bought when the time came to make delivery or take delivery as the case might be. All the defendant's dealings in wheat were closed out in accordance with his instructions and he admitted his liability to pay the plaintiffs' account in regard to them.

The defendant, in June, 1911, made, through the plaintiffs, three sales of flax for October delivery, aggregating 5,000 bushels at \$1.70 per bushel. At this time



he had in crop 250 to 300 acres of flax. Upon making the sale the plaintiffs drew on him for \$750 to provide margin on this transaction. The defendant wrote that he could not pay the draft and asked the plaintiffs to "cancel or close the flax deal." Accordingly, the plaintiffs bought flax to fill the sales made by the plaintiffs, with the result, as flax in the meantime had gone up in price, that there was a loss of \$875. The sale of the flax and the subsequent purchase to cover it were made in accordance with the defendant's instructions. The defendant expected that he would have for sale a large quantity of flax grown upon his own farm. He may have sold in June for October delivery, believing the June price to be high and being anxious to take the benefit of it. It is well known that farmers in this Province often sell wheat or other grain through the Grain Exchange for future delivery as against their expected crop when the price is high and they fear a decline in the market. If the price falls they can deliver their own grain at the higher price at which they sold, or they can buy grain at the low price to offset their sale and receive the difference. Whatever may have been the defendant's intention, the plaintiffs carried out his instructions.

The evidence and correspondence satisfy me that the defendant intended that all the transactions should be carried out in the Winnipeg Grain Exchange as such transactions are usually carried out there. In the advices of sales or purchases sent by the plaintiffs to the defendant from time to time there is printed on the face of the document the following notice: "All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the Winnipeg Grain Exchange." This appears to me to apply to everything that was done in connection with the transactions in question, including the use of the Clearing Association. But, outside the notice, the defendant left

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it to the plaintiffs to carry out the several transactions in the Grain Exchange as such transactions are usually carried out on the Exchange and he knew, or must be taken to have known, that they would be so carried out. All these transactions have been effected and closed in accordance with his instructions and have been accepted by him. It makes no difference to him whether the original party to each transaction was held or whether the Clearing Association was substituted for such party. The brokers had no instructions to sell to or buy from anyone in particular. The interest of the defendant was to have as the other party to the contract a person who would be able to carry it out. The financial ability of the Association to meet all engagements is unquestioned and he had that eminently responsible corporation as purchaser in every sale he made, and as seller in every one of his purchases. The transaction must, however, be carried out through his broker whom, and whom only, the Association treats as principal.

The result of the cases bearing upon this subject is well summed up in *Bowstead on Agency*, 5th ed. page 89: "Every agent has implied authority to act, in the execution of his express authority, according to the usage and customs of the particular place, market, or business in which he is employed. Provided, that no agent has implied authority to act in accordance with any usage or custom which is unreasonable, unless the principal had notice of such usage or custom at the time when he conferred the authority." In support of this proposition the author cites *Sutton v Tatham*, 10 A. & E. 27; *Pollock v. Stables*, 12 Q. B. 765; *Robinson v. Mollett*, L. R. 7 H. L. 802, and other cases.

The custom of using the Clearing Association is not an unreasonable one. It facilitates business and furnishes additional security to persons operating on the Exchange. The Association in the clearing process takes one side of every contract and ensures the performance of the con-

tract. The defendant contends that the effect of clearing the transactions was to substitute new purchasers and sellers, with the result that the intrinsic character of the contract was altered. To substantiate this proposition he relies upon *Robinson v. Mollett*. Persons doing business on the Winnipeg Grain Exchange accept and are bound by the customs and usages of the Exchange unless these are unreasonable. A person wishing to buy or sell options in grain on that Exchange must be taken to accept the usage of putting transactions through the Clearing Association, with the result that the Association will, in the ordinary course, become the opposite party in each contract he makes, while he will be represented by his own broker as the nominal principal. This gave the defendant a party to each of his contracts willing and financially able to carry out the contract. This was beneficial to the defendant and cannot be held to be unreasonable. He had also the advantage of offsetting a sale for future delivery by a purchase for the same delivery or, *vice versa*, in the case of a contract to purchase for future delivery..

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In *Robinson v. Mollett* it was held that the principal was not bound by a custom which was unknown to him, which had the effect of changing the character of a broker, who was an agent to buy for his employer, into that of a principal selling for himself, and thereby giving him an interest wholly opposed to his duty. Such a custom was, doubtless, an unreasonable one and therefore not binding on a principal ignorant of it, but in the present case there can be no suggestion that the plaintiff's interests, while representing the defendant in the transactions, were in any way adverse. The case of *Van Dusen-Harrington C'o. v. Jungeblut*, 77 N.W.Rep. 970, is a decision of the Supreme Court of Minnesota and is very similar to the present case. The judgment of Canty, J., as to the effect of putting transactions similar

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to those in the present case through the clearing house, is very instructive. In that case it was held that the principal was bound by the custom of clearing whether he knew of it or not.

In *Murphy v. Butler*, 18 M.R. 111, this Court held that the custom on the Winnipeg Grain Exchange by which brokers, selling grain for future delivery, enter into contracts for such sales in their own names, without disclosing their principals, was reasonable and that a principal giving instructions to sell on the Exchange was bound by its rules, except in the case of an unreasonable rule not known to him. The case was reversed in the Supreme Court (41 S.C.R. 618) but upon other grounds.

I think the defendant in the present case was bound by the rules and customs of the Grain Exchange including that of putting sales and purchases through the Clearing Association. The transactions were closed and reported to him and he accepted and ratified them. The only reason he gives for not paying the plaintiffs' claim is: "I didn't have the money to pay them, that is the long and short of it, and I haven't it now." He must fail upon the first branch of the defence.

The second branch of the defence is that the dealings in question were illegal. Section 231 of the Criminal Code, R.S.C. c. 146 declares that

"Everyone is guilty of an indictable offence \* \* \* who, with intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company or undertaking \* \* \* or of any goods, wares or merchandise, \* \* \* (a) without the *bona fide* intention of acquiring any such shares, goods, wares or merchandise, or of selling the same, as the case may be, makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any shares of stock, goods, wares or merchandise; or, (b) makes or signs or authorizes to be made or signed any contract \* \* \* purporting to be for the sale or purchase of any

such shares or stock, goods, wares or merchandise in respect of which no delivery of the thing sold or purchased is made or received, and without the *bona fide* intention to make or receive such delivery."

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The enactment first appeared in 1888, 51 Vic., c. 42. The preamble to that Act shows that the legislation was directed towards the suppression of "bucket shops," the prevention of gaming and wagering therein and the punishment of persons engaged in them. A "bucket shop" is a place where bets are made against the rise or fall of stocks or commodities and where the pretended transactions of purchase or sale are fictitious: See *Pearson v. Carpenter*, 35 S.C.R. 380, 382. The fact that a party buys shares or commodities with the intention, not of keeping them, but of selling them when, as he anticipates, they will rise in value, does not make the transaction a gaming contract. "A contract cannot properly be so described (as a gaming contract) merely because it is entered into in furtherance of a speculation. It is a legitimate commercial transaction to buy a commodity in the expectation that it will rise in value and with the intention of realizing a profit by its resale:" *Forget v. Ostigny*, [1895] A.C. 318, 323. Whether any particular case comes within the provision of the Code or not turns upon the intention with which the contract was made, that is to say, whether the contract was real or was only a pretence. Each of these contracts was made with a third party who became the buyer or seller as the case might be. The intention as to whether these were fictitious contracts or not must be gathered from the transactions themselves and from what actually took place between the parties. When we examine the transactions each appears to have been an actual purchase or sale. The cards were produced which recorded each sale or purchase and the person to or from whom it was made. Some of these contracts were with well known grain or milling companies who are constantly dealing in large

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quantities of actual grain. All the transactions went through the Clearing Association, which corporation then became the other party to the contract. Can it be said that the transactions with these parties were not real and that they were merely engaging in gambling ventures with the defendant?

The correspondence and the documents put in show that, although the defendant was undoubtedly speculating on the rise or fall of the market, all the transactions were real. When he sold he contracted to deliver actual grain within a certain time and when he bought he was bound to take delivery in accordance with his contract. He was well aware that he was so bound, but he knew that he could fill his contracts at any time on the Grain Exchange by selling against his purchases or buying to cover his sales and merely paying the difference in money. Were it not for the existence of the Exchange and the facilities it afforded, the defendant would be compelled to take the actual grain he purchased and to deliver that which he sold. The fact that defendant knew that, through the medium of the Grain Exchange, the contract could be carried out without necessarily handling the actual grain does not bring the contract within the provision of the Code. He, no doubt, intended to make or receive delivery of the grain in which he was dealing, in the manner in which delivery of grain is made or received on the Winnipeg Grain Exchange. The provision in the Code is not aimed at such transactions.

From the opinions expressed in *Pearson v. Carpenter*, 35 S.C.R. 380, it is clear that, in considering whether section 231 of the Code applies or not, the true test is, was the transaction a real transaction, or was it only fictitious? See, also, *Universal Stock Exchange v. Strachan*, [1896] A.C. 166. I have no hesi-

tation in finding that the transactions in this case were real and that defendant intended them to be real transactions, although his object may have been one of pure speculation.

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I think the appeal should be dismissed with costs.

CAMERON, J. A. The defendant appeals from the judgment of the learned Chief Justice, and bases his appeal on two grounds: first, that the plaintiff had no authority, express or implied, to carry out the instructions of the defendant in the method in which it did, which method was contrary to the essential nature of the contract of agency, and that, therefore, the defendant was not bound thereby; and, second, that the transaction was illegal and void under the provisions of section 231 of the Criminal Code.

The Winnipeg Grain Exchange is a voluntary association, the objects and methods of which are set forth in its constitution, by-laws, rules and regulations. Amongst them it is declared that its purposes are to provide a suitable room for a grain exchange; to facilitate the buying and selling of grain, produce and provisions; to provide facilities for the prompt and economic transaction of business and to adjust and determine controversies between members. The Winnipeg Grain and Produce Exchange Clearing Association is incorporated by letters patent. Any member of the Grain Exchange may become a member of the Clearing Association upon the purchase of five shares, and upon compliance with certain other conditions. The Clearing House Association is thus closely identified with, and really an adjunct of, the Grain Exchange. The object of the Clearing Association is to facilitate the transaction of business in providing a method by which all the transactions of the members of the Exchange shall be cleared every day through the Association. Each member must hand in to the Manager of the Clearing Association all trades made by him each

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day, both as buyer and as seller, and, upon the Manager accepting these transactions, the Association assumes the position of buyer to the seller and seller to the buyer in respect of such transactions, and the last settling price of the day is to be deemed the contract price therefor. All transactions are to be deemed accepted by the Manager unless the Manager notifies to the contrary by 9 a.m. of the following day. Each member making a transaction for future delivery is to report such transaction by 2 p.m. of the day it is made (except Saturdays) stating its details. Each member is also to report all trades of the day, including all carried forward from the previous day, to the closing market as posted, and hand in a memorandum to the Association not later than 2 p.m. showing the amount due him from, or from him to, the Association, together with a cheque for the amount if a balance be due to the Association. If the balance is the other way he is to receive therefor a cheque from the Association before 2.30 p.m. The Manager may call from purchasers below the market and from sellers above the market such reasonable margins as may be necessary for the protection of the Association, such margins to be placed to the credit of the party paying the same, and to be retained in whole or in part until the trades have been settled. The effect of this is to put the machinery of the Clearing House with reference to marginal payments in the place of the former method of the Grain Exchange by which such payments were demanded and made by the parties themselves and deposited in a bank to their joint credit.

The first transaction here in question concerned the sale of 5,000 bushels of May wheat. January 4, 1910, plaintiff telegraphed defendant: "May closed dollar eight seven-eighths suggest selling five instruct," to which defendant, on the same day, answered, "O.K. sell five thousand." Accordingly the plaintiff went on the floor of the Exchange and sold five thousand bushels of wheat de-



liverable in May to another broker, Bingham, at 108 5/8. The broker's card showing the transaction is produced as an exhibit. Notification of this was sent to the defendant January 5th, in the following terms:

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"We confirm the following trades made for your account to-day on the Winnipeg Option Market:

	Quantity	Delivery	Article	Price	Remarks
Sold	5 M	May	Wht.	108 5/8	

"On all marginal business we reserve the right to close transactions when margins are running out without further notice. All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the Winnipeg Grain Exchange."

Both brokers, the plaintiff and Bingham, reported the transaction to the Clearing Association, where the transactions were cleared in the manner already pointed out.

In Exhibit 37 the sheets and the memorandum submitted to the Clearing Association appear. The sheet, dated January 5, 1910, submitted by the plaintiff, shows 3,000 bushels of May wheat "long," that is, purchased; 5,000 bushels "short," that is, sold for May delivery; and 163,000 bushels "long" open from the previous session, with items of the figures of the previous day's close of the market and of the close on January 5th, and stating "Our check for balance, \$1,152.50." There is then given the resulting balance of 161,000 bushels of "long" wheat as remaining over to the next session. The above 5,000 bushels "short" is the defendant's transaction.

On January 18th, the plaintiff telegraphed the defendant that May wheat was then 106 5/8, and asked instructions, and bought five thousand bushels May wheat 106 1/8, thus realizing a profit of \$125, and of this it advised the defendant, who confirmed the transaction and gave further instructions. This transaction appears in the Clearing House sheet of January 19th, Ex. 37.

Now it is quite clear that, as between the plaintiff and

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the defendant, these two transactions were intended to and did offset each other. There was a contract to purchase to offset the original contract of sale.

As regards the action of the plaintiff in clearing the original transaction for sale of January 4, 1910, that did not put an end to the contract for delivery in May. It went into the Clearing House and was carried forward from day to day until the time was reached for its performance. The brokers acted as principals *inter se* and in the Clearing House the Association became substituted for Bingham as well as for the plaintiff. It is argued that the effect of the rule of the Association being to substitute another principal for Bingham leaves the defendant without a purchaser under the contract to sell, and that this result is inconsistent with the nature of the contract of agency between the plaintiff and the defendant and is not binding on him.

Counsel for the defendant stated that, if the transaction had been carried out under the appropriate by-law of the Grain Exchange, No. 17, under the provisions of which either party might call for a margin to be deposited in the joint names of the parties, then the transaction could not be disputed on this ground. It also seems clear to me that, if the rules of the Clearing House Association had been specified in the notifications sent to the defendant by the plaintiff, it would not have been open to him to dispute the plaintiff's claim so far at least as this objection is concerned. But it was contended that the Clearing House was an independent association and that the words, "rules, regulations and customs of the Winnipeg Grain Exchange" could not be extended to include the rules of the Clearing House, and that the defendant could not, therefore, be bound thereby. That is to say, if the rules and regulations acted upon had been validly made by the Grain Exchange, the plaintiff would have been bound; but, if made by an association plainly an ad-

junct or offshoot of the Exchange, created for the special purpose of facilitating and offsetting transactions between its members, then that result does not follow.

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We were referred on the argument to *Robinson v. Mollett*, L.R. 7 H.L. 802. There a tallow broker in London received orders for the purchase of tallow for future delivery from a customer in Liverpool. The broker bought for himself considerable quantities of tallow, out of which he proposed to supply the quantity ordered by his Liverpool customer. The bought notes sent to the customer disclosed that the broker had purchased on his (the customer's) account. It was held that the broker was really the seller and that any rule in the tallow market enabling him to follow such a course was a rule that actually changed the character of the broker and of the transaction. It was held that such a usage, though shown on the evidence to exist, did not bind a principal who did not appear to have knowledge of its existence.

The decision of the House of Lords in *Robinson v. Mollett* was explained in *Scott v. Godfrey*, [1901] 2 K.B. 726. The custom established in *Robinson v. Mollett* merely regulated the dealings between brokers themselves as principals. But, if it were a custom that enabled the broker to change an order to make a contract with a third party into a contract between the broker himself and his client, that was not a custom binding the client "in the absence of express knowledge," p. 735.

In *Murphy v. Butler*, 18 M.R. 111, it was held by this Court that a custom amongst brokers in the Grain Exchange of entering into contracts in their own names is reasonable and necessary and binding on the customer. This judgment was reversed in the Supreme Court, but upon another ground.

In *Irwin v. Williar*, 110 U.S.R. 499, the decision in *Robinson v. Mollett* was approved, particular stress being placed upon the dictum in that case of Cleasby, B., that

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the interest of the broker for his client is that of buyer; but, if he become principal and, therefore, seller to his client, the two positions are opposed, an inconsistency which constituted the vice of the usage shewn in that case.

In *Van Dusen-Harrington v. Jungeblut*, 77 N.W.Rep. 970, the Supreme Court of Minnesota dealt with a state of matters closely resembling that before us. There the Chamber of Commerce corresponds with the Winnipeg Grain Exchange and there was there a Clearing Association performing similar functions to that in Winnipeg. It was held that it must be presumed that the defendant (the customer) gave the plaintiff authority to execute the transaction according to the usages and customs prevailing in the market where the transaction was to be made. The opinion of the Court is clear, instructive and very much in point, and I would like to quote it at length, but must refrain. I refer to it, particularly to the second branch commencing at page 971. The opinion says, at p. 973:

"The Clearing House took from the plaintiff the risk of the failure of the opposite broker, and also the risk of being buyer for more than it was seller, or seller for more than it was buyer. Then the plaintiff became a mere stakeholder for its own customers, so far as the sales and purchases of these customers balanced each other, and took no risk, except as to the failure of its own customers to pay the amounts due from them; and against this risk plaintiff had a right to demand indemnity in advance. It would seem from the evidence that the Clearing Association took all other risks, and it is not suggested that the association was not amply responsible."

The Court thus took the view that the institution of the Clearing House, whereby the broker became merely a stakeholder for its customers, and where the Clearing House took over the risk of the failure of the opposite broker and other risks, differentiated the case from that dealt with in *Robinson v. Mollett*, and *Irwin v. Williar*. The broker, being

a mere stakeholder in the circumstances, had no conflicting interests and those decisions are, therefore, inapplicable. The Minnesota Court went, therefore, so far as to declare in its conclusions on this branch of the case that, "We are of the opinion that defendant was bound by the custom whether he knew it or not."

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In this case the notices received by the defendant informed him that all purchases and sales made on his account were subject to the rules, regulations and customs of the Winnipeg Grain Exchange. There was a rule or usage that all such transactions should be cleared through the Clearing House Association, affiliated with the Grain Exchange and created for that purpose. That the Clearing Association has nominally a separate organization is not, to my mind, material. The members of the Exchange might, as can readily be conceived, have utilized a committee or an individual officer of the Exchange for the purpose of clearing and off-setting transactions, and, had either of such hypothetical agencies been used, this defence would, admittedly, not have been maintainable. Yet the difference between those methods and that actually in use is not a matter of importance as I see it. The Clearing Association is merely an instrumentality closely bound up with and controlled by the Exchange, through its common membership, and created and used for the purpose of facilitating transactions between the members and of protecting and insuring the performance of contracts between them. The notices sent by the plaintiff to the defendant, detailing each transaction, refer to the "Winnipeg Option Market" and to "margins," and in the correspondence the defendant several times refers to "option" wheat and gives numerous indications of his familiarity with the methods of business on the Exchange. It further appears from the defendant's evidence on discovery that he had transactions of various kinds, in options and otherwise, with the plaintiff for

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several years prior to those in question. Some of these transactions concerned his own grain, others had to do with buying and selling "in the options" as he himself expresses it. The notices given brought home to him the rules and usages of the Exchange, one of which was the method of clearing through the Association. I am, therefore, prepared to hold that the defendant was affected with knowledge of the rule or custom now called in question, and that this defence is not open to him.

The Winnipeg Grain Exchange and its associated Clearing House are institutions of a public character and of great importance in this country where dealings in grain of immense volume are necessarily concentrated and centralized on the floor of the Exchange. The public, particularly that part of it interested in grain and in dealings in grain, is aware, with more or less accuracy, of the functions of those institutions. There is also, I take it, a very general understanding that the person who desires to buy or sell grain through a member of the Exchange agrees to be bound by the rules under which the member must act. Upon the foregoing considerations, which I think are well founded, I confess I can see no great difficulty, nor can I see that any injustice would be inflicted, in adopting the conclusion of the Supreme Court of Minnesota, should it be necessary to do so, viz.: that a customer, who instructs a member of the Grain Exchange to buy or sell for him on the floor of the Exchange, must be taken to have knowledge of the methods by which his orders are to be executed, whether he actually had that knowledge or not, and that the authority to buy or sell carries with it all the additional authority necessary to carry out the transactions in the usual manner.

The defence of illegality arises under the Code, sec. 231, which provides that

"Every one is guilty of an indictable offence \* \* \*

who \* \* \* (a) without the *bona fide* intention of acquiring any such \* \* \* goods, \* \* \* or of selling the same \* \* \* makes \* \* \* any contract \* \* \* purporting to be for the sale or purchase \* \* \* of any \* \* \* goods \* \* \*; or, (b) makes \* \* \* any contract \* \* \* purporting to be for the sale or purchase of any such \* \* \* goods \* \* \* in respect of which no delivery of the thing sold or purchased is made or received, and without the *bona fide* intention to make or receive such delivery."

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The essence of the offence under this section is evidently the intention of the party which must be inferred from the facts and circumstances. The question is, therefore, as to the reality of the transactions. There is no pretence here that these were of the kind familiarly known as "bucket-shop" transactions, where the whole dealings of the customer are confined to the books of the alleged broker. On the contrary, the evidence is that the plaintiff executed each order in accordance with instructions, entering into a contract of sale or purchase as the case might be. There is nothing illegal or improper in the sale or purchase of goods for future delivery. The wheat contracts in this case were in respect of wheat in store at Fort William, and the wheat as sold or purchased had to be delivered or taken over there at the time fixed by the contract. The documents representing the wheat, and for all practical purposes identical with it, would be forthcoming in either case. Perusal of the evidence of the plaintiff's manager, who was taken carefully over each transaction, points strongly, in my opinion, to the conclusion that these transactions were not illusory or pretended. Some of them were with the milling companies whose business is necessarily, presumably, of a genuine character, and others with exporters of whom the same can be said. So far as the plaintiff is concerned I cannot come to any other conclusion than that these purchases and sales were

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intended to be, and were, real purchases and sales and that delivery of the grain represented by them was to be made in accordance with the terms of the various contracts in question. That I have no doubt was the understanding on the part of the plaintiff.

It was held by the Supreme Court of the United States in *Clews v. Jamieson*, 182 U.S.R. 489, that,

"In order to invalidate a contract as a wagering one both parties must intend that, instead of the delivery of the article, there shall be a mere payment of the differences between the contract and the market price." "A contract, which is on its face one of sale with a provision for future delivery, being valid, the burden of proving that it is invalid, as being a mere cover for the settlement of 'differences,' rests with the party making the assertion." *Ib.* p. 490. "The law does not, in the absence of proof, presume gambling." *Ib.* p. 491.

What was the understanding of the defendant as to the character of these transactions? On September 27, 1910, the plaintiff wrote the defendant: "It is now drawing near the 1st of the month, and it will be necessary for you to switch your 5,000 October wheat to some other option month, or else close same out, otherwise wheat is most likely to be delivered to us on the 1st day of October. Kindly attend to this at once, and advise us, and oblige." To which the defendant at once replied, saying: "Re the 5,000 bus. Oct. option wheat, you might kindly switch over to the month you would think the best to go in on." Can this leave any other inference to be drawn, in this and the other transactions, than that the defendant was aware that, when the option month came, the time of the maturity of the contract, he must be prepared to accept or deliver the wheat as the contract demanded? I think not. It would seem to me, on a perusal of the evidence and of the correspondence, that the defendant was familiar with the true nature of the transactions as it was understood by the plaintiffs. In the case referred to in his letter of September 29, 1910.



he knew that he had to take the wheat under his contract (though he tried to fence with questions as to the plaintiff's letter on his examination). That incident is, I think, typical of the other transactions. I do not read the correspondence between the parties as evidencing anything to the contrary. Indeed it appears to me that this defence was plainly an after-thought, for the defendant says himself that he approved of the various transactions, and that, practically, the reason why he did not pay the plaintiff was because he was not in funds. So that, this defence having been made after action brought, we are now asked to read the defendant's letters and extract from them some terms and phrases which would indicate that his intention was never to carry out the contracts he instructed the plaintiff to enter into; but I submit that his correspondence is quite consistent with a knowledge on his part of the reality of the transactions. Certainly the plaintiff did not take the view that the defendant's instructions were other than genuine. And the conclusion to be drawn from the whole evidence is, in my opinion, that the defendant knew that, when he sold for future delivery, he would be called upon to deliver the grain or the documents respecting it at the maturity of the contract, and that when he purchased for future delivery to him he would be called upon to take delivery in due time. He was also, it is quite true, perfectly well aware that he could anticipate and offset these future or forward contracts by purchases or sales, as the case might be, maturing in the same option month. But these transactions, while they may be termed speculative in a sense, were certainly, to my mind, not fictitious or pretended, but were real and substantial and therefore cannot be within the prohibitions of the Code.

What I have said with reference to the transactions in wheat applies also to those in flax. And in connection with these I must refer to the defendant's letter pre-

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ceding them, dated June 8, 1911, in which he writes that "We ourselves will have between 250 and 300 acres in," that is, in flax. It would be a reasonable conclusion that the proposed sales of flax were as against the crop to be delivered. Apart from other considerations, on the fact of that letter, can it be reasonably said that the defendant's sales of flax for future delivery had no connection whatever with an intention on his part to deliver? I would say that it could not. On the contrary there is an obvious connection between the grain sold for future delivery and the grain to be grown.

This branch of the case, viz., that of the illegality of the transactions (the burden of establishing which lies on the defendant), was the whole question before the Chief Justice of the King's Bench, who tried this action. On this question he found that the defendant had failed to make his case, and, upon the best consideration I have been able to give to the matter, I am unable to see my way to disturb that finding.

I am of opinion that the appeal must be dismissed with costs.

*Appeal dismissed.*

[Appealed to the Supreme Court.]

## BRUCE v. JAMES.

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Before THE REFEREE.

*Architect—Liability of, to owner for negligence—Building contract making architect's certificate final and conclusive—Measure of damages—Quantum meruit.*

1. An architect employed by the owner to superintend the erection and completion of a building for him under the usual building contract, whereby the architect's certificates are made a condition precedent to the liability of the owner to make payments to the contractor and his final certificate of completion is necessary to entitle the contractor to payment of the full price of the work, and is made final and conclusive between the parties, may be liable to the owner for damages caused by the issue of such final certificate if, in fact, the building has not been properly completed according to the plans and specifications and it is shown that the architect, assuming that he was honest and desirous of being impartial, could not have given such certificate unless he had been negligent in discharging his duty of superintending the work for the owner and in making his final inspection of it.

*Badgley v. Dickson*, (1886) 13 A.R. 494; *Rogers v. James*, (1891) 8 T.L.R. 67, and *Saunders v. Broadstairs Local Board*, (1890) 2 Hudson on Building Contracts, 159, followed.

*Chambers v. Goldthorpe*, [1901] 1 K.B. 624, distinguished.

2. When, in such a case the owner by the terms of the contract has no defence against the contractor's claim for the amount shown by the final certificate, the damages awarded to him against the architect should be the amount it would cost to put the building into the proper condition as called for by the plans and specifications.
3. The fact that the owner has succeeded in compromising with the contractor and getting a settlement with him for less than the amount called for by the final certificate, by reason of the imperfections in the work, does not affect his right to such damages against the architect, except that the amount saved by such compromise should be taken into account in favor of the architect.
4. Notwithstanding the negligence of the architect in such a case, he is nevertheless entitled to be paid for his services *quantum meruit* when he has been employed on the usual terms.

Judgment allowing plaintiff \$50 out of his claim for \$100, and costs of a mechanic's lien action for that amount, and allowing defendant on his counterclaim \$165.50 with costs. Set-off allowed, plaintiff to pay the difference.

DECIDED: 17th May, 1913.

ACTION to enforce a mechanics' lien.

Statement.

W. L. McLaws for plaintiff.

E. L. Taylor, K.C., for defendants.

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**THE REFEREE.** The plaintiff claims \$100 for his services as an architect in superintending the construction of a dwelling house for the defendant and for making extra drawings required in consequence of changes in the original plans and specifications, which changes had been assented to by the defendant. The plaintiff had prepared these original plans and specifications and had been paid for them. He was not at first employed to superintend the work, but was called in after the foundation was in and the beams, joists, posts and rafters placed in position. That was on or about the 15th of August, 1911. He made about nine personal visits of inspection of the work between that date and the 5th of November, 1912, when his final inspection was made. In addition to the visits he wrote a number of letters to the contractor drawing his attention to the numerous complaints about the work which the defendant made from time to time. He gave the contractor in all five certificates for payments, the final one, dated 18th November, 1912, being for \$784.60 and showing that it was for the full balance of the contract price and extras, \$3700 having been previously paid.

Defendant disputes the plaintiff's right to payment claiming that the plaintiff, while acting in the capacity of architect for the defendant, did so in a negligent, careless and indifferent manner and that, by reason of such negligence, carelessness and indifference, the work upon the building was improperly performed and defective materials supplied, and that he has suffered serious damage. He further says that the plaintiff, while purporting to act for him in reference to the said building, acted against the interests of the defendant and in the interests of the contractor, and issued certificates showing that the said work was complete in every respect, although it had been performed in an improper manner and not in accordance with the plans and specifications relating

thereto, and that, owing to the issue of the plaintiff's final certificate, he was obliged to pay a larger sum to the contractor than should have been paid in order to avoid litigation.

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Defendant also counterclaims for damages suffered by him in consequence of the plaintiff's alleged negligence and says that, by virtue of the plaintiff's said carelessness, negligence and indifferent work and the improper issue of the certificates for payment, he suffered damage in connection with the building and was obliged to pay more to the contractor than the building was worth in order to avoid litigation, and that he has suffered damages by reason of the premises to the extent of \$300, for which amount he claims judgment.

I am satisfied on the evidence, and after a personal view of the premises in the presence of the solicitors for the parties, that the defendant has good cause to complain that the house was not completed according to the plans and specifications in a number of important respects. For example, one of the stone posts underneath the front of the verandah is only three feet in the ground although the plan shows that it should be six feet deep. Several of the windows fit very badly and the upper sashes cannot be lowered. The frames for several of the doors are so badly constructed that the doors cannot be properly opened and shut, some of the frames being wider at the top than at the bottom and some wider at the bottom than the top. The floors are not free from knots as required and have not been properly dressed or put down. The woodwork finish in many parts of the house has not been sandpapered and filled and stained and varnished in the manner required by the specifications. This is obvious both to the eye and to the touch of even an unskilled observer. The door frames have been stained a different color from the doors and the floors have not been dressed and varnished as required by the specifications.

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Rain-water gets in over the front windows owing, apparently, to the improper construction of the eaves-trough leading from the roof of the verandah across the top of the windows. There is no panelling in the parlor as plainly shown on the plans and drawings. These are the main defects although there are a number of others of less importance, which, in my opinion, the plaintiff should not have passed over.

I therefore find, without hesitation, that the plaintiff should not have given the contractor the final certificate, Exhibit 15. Although it does not say that the work has been completed and the word "final" is not used, yet it is a final certificate within the meaning of the contract, Exhibit 9, as it shows that the amount certified for is the balance remaining after deducting previous payments from the full contract price and the amounts allowed for extras: *Brown v. Bannatyne School District*, 22 M.R. 260.

The contract between the defendant and the builder, Exhibit 9, referring to the final certificate of the architect, provides that "Such final certificate shall be conclusive evidence of the fulfilment of this contract by the contractor within the meaning hereof." Also, Article X, that "No certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the fulfilment of this contract by the contractor." And I am of opinion that the defendant was bound by the certificate and had no defence to the contractor's claim for the amount mentioned in that certificate: *Brown v. Bannatyne, supra*, unless he could have set up fraud or collusion as against the plaintiff.

The question then arises, is the architect liable for negligence in giving such final certificate? In *Badgley v. Dickson*, 13 A.R. 494, a decision of the Court of Appeal in Ontario, it was held that, although an architect employed by the owner for reward to superintend the

construction of a house may, as between the latter and the contractor, by the terms of the agreement, be in the position of an arbitrator and his decision as between them unimpeachable except for fraud or dishonesty, yet, as between himself and his employer, he is answerable for either negligence or unskilfulness in the performance of his duty as architect. And a prior decision of *Irving v. Morrison*, 27 C.P. 242, was approved, in which it was held that the owner was entitled to deduct from the amount which would have been due to the architect the loss sustained by the latter's negligence in certifying for too much.

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In *Rogers v. James*, 8 T.L.R. 67, it was held by the English Court of Appeal that there was a liability on the part of the architect to the building owner if he has been guilty of negligence in certifying for too much. See also *Saunders v. Broadstairs Local Board*, 2 Hudson on Building Contracts, 159, a case almost on all fours with the present case.

In *Chambers v. Goldthorpe*, [1901] 1 K.B. 624, it was held by two of the Judges of the Court of Appeal, Romer, L.J., dissenting, that the architect, in ascertaining the amount due to the contractor and certifying to the same under the contract, occupied the position of an arbitrator and therefore was not liable to an action by the building owner for negligence in the exercise of those functions.

The alleged negligence in that case was as follows: The negligent measuring up of work done by the contractor for the erection of the house and permitting him to include in his accounts sums to which he was not entitled and certifying such accounts.

In the present case, however, the negligence alleged was: (1) acting in his capacity of architect in a negligent, careless and indifferent manner, whereby the work was improperly performed and defective materials were supplied; (2) acting against the interests of the owner

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and in the interests of the contractor, and (3) improperly issuing certificates showing that the work was complete in every respect, although it was not, in consequence of which the defendant had to pay too much to the contractor.

The case of *Rogers v. James* is distinguished at p. 633 of the report of *Chambers v. Goldthorpe*, and also at p. 637, where it is pointed out that the judgment appeared to have proceeded upon the ground that the action against the defendant was for negligence in the performance of that part of his duties in which he was merely acting as the owner's agent—or, in other words, in the performance of a duty which he owed to his employer, and to him alone, in respect of a matter in which he was acting solely as agent for the building owner.

I think this case comes within the principle of *Rogers v. James*, *Saunders v. Broadstairs Local Board* and *Badgley v. Dickson*, and I hold that the architect is liable for negligence in the performance of his duties of inspection and supervision, which he undertook for reward. He was undoubtedly negligent in not ascertaining positively that the stone post at the verandah was only three feet in the ground. His attention had been called to the matter in the preceding June, and he had then written to the contractor requesting him to have the defect remedied, but it has not been remedied. His attention had been repeatedly called to many of the other defects, such as the finishing of the woodwork, the staining, sand-papering, plastering, ill-fitting doors and windows and other matters. He had himself repeatedly called on the contractor to remedy these, and had written letters showing that he was well aware of the defects complained of.

On the 24th November, 1911, he wrote to the contractor: "During my visit this morning I found the work in a deplorable condition and it is my disagreeable duty to give you the six days notice provided for in the con-



tract to take down the finish and send competent tradesmen to overhaul the whole of the plaster. The woodwork is very rough and large portions of the work and finishing will be overhauled before the work is accepted."

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On the 1st January, 1912, he wrote to the contractor's agent a letter from which I take the following extracts:

"I have made an inspection of the work, and words fail me to express my regret at the manner in which Mr. Wire's workmen have left the work. Will you please give immediate instructions to make the doors to open and close properly, fit the windows in a reasonably tight manner. The painter has left the work in a shameful manner and will you please make your painter understand that this work must be finished as specified."

On the 5th February, 1912, he wrote the contractor:

"It appears needless to ask you further to put right the carpenter work and the painting in accordance with your contract, and you must understand that this is the last notice you will receive in terms of your contract, and if you fail to fix the taps in a safe and sound manner, make the doors between the parlour and the dining room to work properly, fix the fan light openers, make good the floor in the staircase hall and the kitchen, finish and straighten all the plaster work, overhaul the whole of the painting, all as specified, within six days from this date, the whole of the work will be overhauled at your expense and the cost thereof will be deducted from the balance due to you."

On the 9th March, 1912, the plaintiff wrote the contractor's agent as follows:

"When the foreman called here some time ago I showed him the specifications and the sample of work contracted to be done, and asked him to send a good man there and begin at the top of the house and do the work within a reasonable meaning of the sample and the specifications, and he promised to do so, at the same time admitting that the work was rough. What more can I do? If the painter estimated on the specifications you can get the work overhauled and collect the costs from him, as it is simply a very bad job indeed."

On the 3rd June, 1912, the plaintiff wrote the con-

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tractor a letter from which I take the following extracts:

"Mr. James has rung me up to say that a large amount of water is coming through the front wall and running down on the plaster and floor. I am also informed that you have not overhauled the windows as you promised to do; that you have put additional stain on certain wood-work where your man promised to rub it smooth; that you have only given one coat of varnish to the floors where it is specified two coats, and that you have not varnished the staircase as specified."

I find on the evidence, and from my personal inspection, that the work was left very much in the same condition as is described by the plaintiff in his letters, and I hold that he must have been negligent in his inspection when on his final visit he failed to notice any of these defects and gave a certificate equivalent to one saying that the work had all been completed according to the plans and specifications. He was either guilty of the negligence above attributed to him or he must have been acting partially towards the contractor in giving that certificate.

Partiality under such circumstances would, in my opinion, be equivalent to such fraud as to make the architect liable. The defendant has not pleaded fraud or partiality, although he has alleged that the plaintiff acted in the interest of the contractor. This allegation is too indefinite to amount to a charge of fraud or collusion such as would have given him a defence as against the contractor or destroyed the binding effect of the final certificate.

I find, therefore, that the plaintiff is liable to the defendant for damages caused by the plaintiff's negligence above set forth.

I do not think the fact that the defendant succeeded in compromising with the contractor and getting a settlement with him for \$700 instead of \$784.50 makes any difference, except that the amount thereby saved, \$84.50, should

be taken into account in arriving at the damages assessed against the plaintiff.

It is difficult to ascertain exactly what such damages were; but evidence was given to show that the selling value of the property in its present condition would be from \$400 to \$500 less than it would be if the house had been completed according to the plans and specifications. That may not be a proper measure of damages. If the damages should be the cost of now putting the house into the proper condition as called for by the plans and specifications, I think the evidence shows that it would require at least \$165.50 over and above the \$84.50 above referred to, to do so, and that the defendant should be allowed that sum on his counterclaim.

It remains to deal with the plaintiff's claim. He certainly gave a good deal of attention to the work and his services were probably of some value to the defendant in getting better work than he might have got otherwise, and he made a number of extra drawings that he has not been paid for. Notwithstanding his negligence, he is entitled to be paid for his services *quantum meruit*. That was the course taken in *Rogers v. James, supra*, where the jury's verdict for the plaintiff for £58, instead of £123 as claimed, was not interfered with. If I allow the plaintiff \$50 on his claim, I think I will not be doing the defendant any injustice.

Verdict for plaintiff for \$50 and costs of a mechanics' lien action for that amount. Verdict for the defendant on his counterclaim for \$165.50 with costs. I allow a set-off and order plaintiff to pay the difference.

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## MACKISSOCK V. BROWN.

Before PRENDERGAST, J.

*Partnership—Agreement to enter into partnership—Mining location—Statute of Frauds—Costs.*

The defendant agreed to stake two mining claims for the plaintiffs and one for himself and that the three claims should then be worked together on a partnership basis. The plaintiffs advanced moneys to the defendant from time to time to enable him to stake the claims and register them.

Defendant staked only one claim and that in his own name. There was no evidence that each claim was to be jointly owned by the three parties.

*Held*, that there was no actual partnership entered into, but only an agreement to form a partnership on certain conditions, and that, therefore, the plaintiffs were not entitled to a declaration of partnership in the claim which the defendant had staked or to any other relief than judgment for the return of the moneys they had advanced. Though the total of these was only \$65, plaintiffs were given full King's Bench costs, not subject to set-off, because defendant had been guilty of flagrant deceit and falsehood in the matter.

There may be an agreement of partnership without writing notwithstanding that the partnership is intended to deal with land, and the Statute of Frauds will not avail as a defence to an action to enforce such agreement.

*Forster v. Hale*, (1800) 5 Ves. 308; *Gray v. Smith*, (1889) 43 Ch. D. 208, and *De Nicols v. Curlier*, [1900] 2 Ch. 410, followed.

DECIDED 22nd January, 1913.

Statement. THE plaintiffs alleged that they verbally entered into a partnership agreement with the defendant for the purpose of locating and exploiting coal deposits on Lake Winnipeg, in pursuance of which they from time to time advanced him large sums of money, and prayed for a declaration of partnership with respect to certain coal deposits located by the defendant and mining rights secured by him in his own name from the Dominion Government, for discovery of the said locations, delivery of all licenses and other documents, relating to the said mining rights, and that he be restrained from dealing with the same.

The defendant denied any agreement. He admitted having received from time to time from the plaintiffs

several small sums not exceeding \$50 in all, but stated they were advanced to him by way of friendly loans and that no part of them was used by him in the locating or promoting of any coal deposit. He also relied on the Statute of Frauds, on the ground that, if there was an agreement, it was not in writing.

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*B. L. Deacon and D. N. Wemyss* for plaintiffs.

*H. M. Hannesson* for defendant.

PRENDERGAST, J. I will dispose at once of the last ground of defence, by stating that, although the decision in *Caddick v. Skidmore*, 2 De G. & J. 52, is generally looked upon by text-book authorities as a sounder interpretation of the statute, still the law on the point must be taken to have been correctly stated in *Forster v. Hale*, 5 Ves. 308, and *Dale v. Hamilton*, 5 Ha. 369, S.C. on appeal, 2 Ph. 266, which have been treated as binding in the recent cases of *Gray v. Smith*, 43 Ch.D. 208, and *De Nichols v. Curlier*, [1900] 2 Ch. 410. In *Forster v. Hale*, *supra*, the Lord Chancellor said: "The question of partnership must be tried as a fact and as if there was an issue upon it. If by facts and circumstances it is established as a fact that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident." The plaintiffs are not precluded, then, from establishing by oral evidence the agreement which they allege.

Now the facts appear to be substantially as follows:

The defendant had discovered a coal deposit in a secluded spot on the shores of Lake Winnipeg. He felt, however, that he required assistance, as he had no technical knowledge about coal or coal-mining, and would moreover require at intervals small sums of money to carry on his explorations further. So, in October, 1910, he went to Peter MacKissock, whom he knew to have studied mining in Scotland, and to be able to assist him financially.

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The defendant says he went to Peter MacKissock just to ask him in a friendly way what he thought of a sample of coal that he had brought down from the deposit and that his receiving \$10 from him at the same interview was for private purposes and had nothing to do with coal. But this is untrue.

I find that the defendant on this occasion, after saying he had found coal on Lake Winnipeg and showing them the location on a sketch, made to Peter MacKissock and his son, William Black MacKissock, who was with him, the following proposition: He (the defendant) was to go back at once to the location, stake one claim for himself and one for each of the plaintiffs, bring back samples, have the samples analyzed and, if satisfactory, register the claims and put the papers in the plaintiffs' hands. They were then to enter into a partnership "to develop the mine," the defendant and William Black MacKissock attending to the work at the mine itself, and Peter MacKissock financing the enterprise, making arrangements with the railway companies and generally attending to the city end of the concern—profits to be divided equally between the three.

On this occasion Peter MacKissock gave the defendant \$10 to pay expenses going to the Lake.

The defendant consequently went to the location shortly afterwards, and came back bringing samples and saying he had staked the three claims, which was untrue, as he only staked one for himself. Peter MacKissock had the samples analyzed, for which he paid \$6, and the test showed the coal to be valuable. He then gave \$7.50 to the defendant to register the three claims, which he had said he had staked; and the defendant some time later reported that he had effected this registration—which was only true, of course, of his own claim, and could not be true of the two others which he had never staked.

The plaintiffs then began, and for six months continued, insisting: 1st, that the claim certificates be delivered to them as agreed; 2nd, that partnership papers be drawn, and 3rd, that they be taken to the location. During that time the defendant continued asking money from Peter MacKissock, from whom he admits he received in the aggregate about \$65.

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The defendant uniformly met all of the plaintiffs' requests with evasions and untruths. The appointments that he made with them over and over again to take them to the Lake were each time broken, and made the occasion for baseless excuses and explanations. In fact the correspondence produced, and the testimony of the plaintiffs' solicitor and of another witness show that the defendant's course throughout was marked by deceit of the most flagrant nature.

At the same time, I cannot make out from the above facts that there was an actual partnership.

I find two things: first, an undertaking by the defendant to stake two claims for the plaintiffs as well as one for himself, and, secondly, an agreement that the three claims should be put together and worked on a partnership basis. I cannot find any evidence that each claim was to be jointly owned by the three parties. That the defendant failed in his undertaking to stake two claims for the plaintiffs does not make the one that he staked for himself the joint property of the three. I find an agreement to form a partnership on certain conditions, but not an actual partnership. Even if it was defendant's fault that the conditions did not materialize, I do not see that I can extend any other relief than allow the plaintiffs to recover the money they have paid.

The plaintiffs may have judgment for \$65, or take out an order of reference to first ascertain the amount advanced by them—with leave reserved to sue for damages or otherwise if so advised.

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As to costs, I feel that the defendant's duplicity has been such that the plaintiffs should have their costs on the scale of this Court, without statutory set-off.

## COURT OF APPEAL.

## CANADA LAW BOOK CO. v. BUTTERWORTH.

Before HOWELL, C.J.M., PERDUE and CAMERON, J.J.A.

*Contract—Construction of—Acceptance of offer—Agency—Extension of time of sole agency—Injunction—Ambiguity.*

Action for injunction to prevent the defendants from violating their contract giving plaintiffs the sole agency in Canada and the United States for the sale of "Halsbury's Laws of England." The principal question to be decided was whether the agency had expired by effluxion of the stipulated time.

In a memorandum submitted by defendants, but not signed by them, they had offered to give the sole agency for five years from publication of volume 1, which was in November, 1907, or for one year after publication of the last volume of the set, whichever should be the longest period.

Plaintiffs wrote in reply to this stipulating, among other things, for the sole agency "for five years from the date of publication." Defendants cabled their acceptance of plaintiffs' modified terms and on 14th June, 1907, wrote plaintiffs a letter confirming the cable message, but adding "The terms between us are now as set out overleaf."

*Held*, that the expression "date of publication," without more, was ambiguous and might refer either to the first volume or the last.

In the "overleaf" it was mentioned that the sole agency was to be for five years from the date of publication of volume I. A large number of sets of the work had been sold by the plaintiffs under their agency during the intervening five years.

*Held*, 1. The fact that Mr. Cromarty, the general manager of the plaintiffs, had not seen the defendants' letter of 14th June, 1907, or the "overleaf" terms, owing to his absence, was no excuse for the plaintiffs' conduct, the defendants having no knowledge of that fact, and the plaintiffs must be held to have had knowledge of the contents of the letter and to have accepted the defendants' terms as stated therein.

2. If there was no acceptance in fact of the "overleaf terms" by the plaintiffs, then there was no *consensus* between the parties and the plaintiffs had not proved the contract upon which they relied.



3. The cablegram sent by the defendants unsigned saying, "Agree your modified terms, writing," was not an unqualified acceptance of the plaintiffs' terms and the letter following must be read with it, more especially as nothing had been done, nor had the plaintiffs' position been altered in any respect, between the receipt of the cablegram and that of the letter.
4. The plaintiffs had failed to establish a contract entitling them to the sole agency beyond November, 1912, and their action should be dismissed with costs.

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DECIDED: 25th April, 1913.

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ACTION to restrain the defendants from selling in Canada a legal work called Halsbury's Laws of England as being in contravention of an agreement set up by the plaintiff company.

The case was tried before Metcalfe, J., who held as follows:

1. That the expression "date of publication" in a letter written by the plaintiffs to the defendants, without more, meant the date of publication of the last volume of the work.

2. That the plaintiff company was estopped by its conduct from denying that the variations, if any, mentioned in the "overleaf," became a part of the contract and from denying that it accepted any variation therein expressed.

3. That such terms of the original memorandum as were not varied or cancelled by the subsequent correspondence were essential parts of the contract; and that, therefore, the plaintiff company had a right to a renewal of the term of the sole agency, whatever that term was, by virtue of a clause quoted from the memorandum set out in the judgment of Perdue, J.A., which right of renewal the plaintiff company had not, in the circumstances, lost by failure to give notice of exercising it to the defendants before the expiration of the five years from the publication of volume I; and that the plaintiff company was entitled to an injunction against the defendants, who had, immediately after the

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Statement. expiration of five years from the publication of volume I, taken steps to sell the work in Canada and the United States independently of the plaintiffs.

4. When two documents can be connected together by a reasonable inference, they may be read together so as to constitute a complete memorandum within the Statute of Frauds, although there be no express reference from one document to the other; the memorandum and correspondence referred to in this case together constituted a sufficient writing to satisfy the Statute of Frauds.

5. Section 4 of the Statute of Frauds applies to any contract not to be performed within a year, though it be one for the sale of goods, and is not repealed by section 6 of the Sale of Goods Act, R.S.M. 1902, c. 152.

Injunction as prayed.

Defendants appealed.

*C. P. Fullerton, K.C., and C. S. Tupper* for defendants, appellants, cited *Dalrymple v. Scott*, 19 A.R. 477; 7 *Halsbury*, p. 350, par. 720; *Falck v. Williams*, [1900] A.C. 176; *In re Birks*, [1900] 1 Ch. 417; *Proprietors v. Arduin*, L.R. 5 H.L. 64, 68, 83; *Lewis v. Stephenson*, 67 L.J.Q.B. 296; *Dewson v. St. Clair*, 14 U.C.R. 97; *Makin v. Watkinson*, L.R. 6 Ex. 25; *Vyse v. Wakefield*, 6 M. & W. 442; *Canning v. Temby*, 3 Commonwealth, 419, 457; 7 *Halsbury*, p. 272; *Reid v. Blaggrave*, 9 L.J.Ch. (O.S.) 245; *Harries v. Bryant*, 4 Russ. 89; *Barrow v. Isaacs*, [1891] 1 Q.B. 417; 18 *Halsbury*, 391, 462; 13 *Halsbury*, 17, 152-3; *Wentworth v. Hull*, 64 L.T. 190; *Prested v. Garner*, [1910] 2 K.B. 776, and *Marshall v. Marshall*, 38 Ch.D. 330.

*A. B. Hudson and H. E. Swift* for plaintiffs, respondents, cited *Bellamy v. Debenham*, 45 Ch. D. 481.

The judgment of the Court was delivered by

PERDUE, J.A. The plaintiff is an incorporated company and deals in law books in Canada and elsewhere.

Butterworth & Company is a firm of law publishers with its chief place of business in London, England. Butterworth & Company (Canada), Ltd., is a joint stock company incorporated in England in November, 1912, but having its head office in London; and carrying on business there and in Canada. Mr. S. S. Bond controls both the firm and the defendant company. The transactions in question in this suit took place between the plaintiffs and the firm of Butterworth & Company, the other defendant not then being in existence.

Butterworth & Company, in or about the year 1906, undertook the publication of the work known as "Halsbury's Laws of England." This work was to be published in consecutive volumes issued from time to time, and it was expected that it would take several years to complete the series. The plaintiffs opened a correspondence with Butterworth & Co. with a view to securing the exclusive agency or right to sell the work in Canada and the United States. In furtherance of the negotiations, one Robinson, representing the plaintiffs, called upon Bond in London, and the latter gave to Robinson a written memorandum containing a proposal of the terms upon which the agency requested would be given to the plaintiffs. This memorandum is unsigned and is as follows:

- "1. Order to be accepted by the Company.
2. Sets not to be returned to England.
3. We to do our best to prevent sale to Canada.
4. Sole agency to Canada and U.S.A. for five years from publication of Volume I, or for one year after publication of the last volume of the set, whichever shall be the longest period.
5. Sole agency after the above mentioned period shall be obtained by their taking fifty sets for the first year and forty sets for the next year and so by a sliding scale to ten sets for the fifth year.
6. Five hundred sets at 7s. 6d. in quires to be taken within two years, ordinary account.
7. We to hand over the orders from above territory received before this date, and to receive a bonus of 3s. per volume for the same; also to refer future orders and enquiries while this agreement lasts to the Canada Law Book Co.

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8. B. & Co. to take back up to 100 sets at same price as charged at completion of the expiry of the sole agency."

After receiving the above proposal the plaintiffs wrote the following letter:

"May 21, 1907.

"S. S. Bond, Esq.,  
c-o Messrs. Butterworth & Co.,  
12 Bell Yard, Temple Bar,  
London, England.

"Dear Mr. Bond:

Referring further to Halsbury's Laws of England, Mr. Robinson has just handed me the proposition you made to him. Let me say, in reference to the statement, that we were paying Green 7s. 6d. per volume. This is a mistake, we are paying 7s. only. As to the guarantee of fourteen volumes, the additional volumes of course will be free. We were to take 300 sets inside of five years from September last. It seems to me your proposition is a pretty stiff one. Doubtless you think you have given us full sale in the United States. We have sold but thirty sets of the Encyclopedia of the Laws in the United States.

Green and Sweet & Maxwell, handed over to us all orders that they had in the United States and Canada without any reserve, or cost to us. I do not exactly know what is in your mind about the sale in this part of the world, but I have often made many statements to you, most of which have turned out to be true. I think I can tell you now, if you handle the sale yourself, you will meet with a dismal failure, for there is only one means of selling Law Books in Canada. It is that which we have adopted, and it is expensive.

We should like very much to handle the sale of Halsbury's Laws, and would be able to give you much better satisfaction than you could get through any other channel, but the terms are too stiff. If you want the assurance of an annual sale of this work, you may rest assured that if the sale can be made, we can do it, and if the agency is handed over to us it will receive proper attention from us. If you wish, we will meet you half way and pay 7s. 6d. per volume, we to agree to take 400 sets within two years, for the sole agency for Canada and the United States for five years, from the date of publication. We will waive the right to return any copies all of which will be purchased outright. You will hand over to us any orders you have in Canada and the United States, without any cost to us. We will agree to supply them at the special price. I think you will agree if you will look on it, it is unreasonable for us to pay any extra 3s. per volume. Doubtless many of the persons who have given orders are undesirable. These parties are ever ready to order. The above offer is a most reasonable one, and a fair one considering we have only seven million people in the Country.

You are also mistaken regarding the probable sale in the United

States. I have decided and proved this in the last six months, and know whereof I am speaking.

On receipt of this letter, you might wire me acceptance or refusal. We of course have the right to purchase additional sets at the price.

Yours very truly,

"Canada Law Book Company, Limited."

On receipt of this letter Butterworth & Co., on 13th June, 1907, cabled as follows:

"Cromarty, Toronto.

"Halsbury's Laws, agree your modified terms, writing."

The name "Cromarty" in the above referred to Mr. Cromarty, the president of the plaintiff Company.

The cablegram was not signed.

On the 14th June, 1907, the following letter was written by Butterworth & Co.:

"London, W.C., 14th June, 1907.

"The Canada Law Book Company, Ltd.

32-34 Toronto Street, Toronto.

Dear Sirs:

"THE LAWS OF ENGLAND"

By the Earl of Halsbury and a Distinguished Body of Lawyers.

We are in receipt of your letter of May 21st, with reference to the above. Although we think that you should not have had any difficulty in falling in with our proposal, yet we will agree to accept your modification of our terms. The terms between us are now as set out overleaf.

We cabled as requested as follows:—

"Cromarty, Toronto, Halsbury's Laws. Agree your modified terms—writing."

If you would not mind turning up your letter of Dec. 27th, 1906, and also your letter of Mch. 7th, 1907, you will see that you state the price is 7s. 6d. in the one and 7s. in the other; hence the misunderstanding as to price.

We are taking most extraordinary care over the production of this work, and although the first volume is much delayed the future volumes will come along fairly quickly. We are obtaining the finest writers for each topic.

Yours faithfully,

"Butterworth & Co."

The terms referred to in the letter as "set out overleaf" were on a separate sheet which was enclosed with the letter. The following is a copy:

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"Arrangements with The Canada Law Book Company, Ltd., for  
"Halsbury's Laws of England."

1. This arrangement to be between the Company, if we decide to make one for this undertaking.
2. Sets not to be returned to England.
3. Butterworth & Co. to do their best to prevent sale to Canada.
4. Canada Law Book Company to take (400) four hundred sets within two years in return for the sole agency to Canada and the U.S.A. for five years from date of publication of volume I. During the said sole agency they to have the right of purchasing additional sets at the same price.
5. Butterworth & Co. to hand over any orders from above territory that they have received.

June 14th, 1907."

No reply was made by the plaintiff to the above letter of 14th June, 1907. The parties then proceeded to do business on the basis of these terms as if they had been settled and agreed upon. The plaintiffs purchased the sets of the work they agreed to take and carried out the other terms contained in their proposal. Butterworth & Co., on their part, gave the sole agency to the plaintiff company and fulfilled the other terms to be performed by them.

The whole dispute between the parties is in regard to the date from which the five years sole agency was to run. The plaintiffs claim that their agency has not yet expired and ask an injunction to restrain the defendants from selling the work in Canada or the United States. The plaintiffs in their letter of 21st May, 1907, say: "We to agree to take 400 sets within two years, for the sole agency for Canada and the United States for five years, from the date of publication." They contend that this means, from the date of publication of the complete series. The first proposal made by Bond, which I shall call the Robinson terms, was explicit upon this point. By the fourth of these terms the agency was to continue for five years from the publication of the first volume or for one year after publication of the last volume of the set, whichever should be the longest period. When

Butterworth & Co. wrote the letter of 14th June, 1907, accepting the plaintiffs' proposal, they took the precaution of setting out the terms to which they were prepared to agree. These terms were practically the same as those proposed by the plaintiffs, but the date from which the five years' period was to run was definitely fixed as that of the publication of volume I. The first volume was published on November 14, 1907, and, under the terms of the Butterworth letter of 14th June, the five years would expire on 14th November, 1912. The complete work has not yet been published.

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Butterworth & Co.'s letter of 14th June, and the "overleaf" enclosed, setting out the terms, was duly received by the plaintiffs and no objection was taken or reply made. Mr. Cromarty, it appears, was absent when the letter arrived. Instead of the letter being filed under the heading "contracts," it was, he says, filed amongst the general correspondence and not seen by him until the spring of 1912. This affords no excuse for the plaintiffs' conduct. The plaintiffs received the letter which clearly showed Butterworth & Co.'s understanding of what was meant by the words, "from date of publication." If the plaintiffs meant something different from Butterworth & Co.'s interpretation of the words, they should have written and so informed the other party before proceeding to act. The plaintiffs must be held to have had knowledge of the contents of the letter. They acquiesced in Butterworth & Co.'s statement of the terms, or, at all events, raised no objection to them, and proceeded to carry out the transaction. This must be construed as an acceptance of Butterworth & Co.'s terms. If there was no acceptance in fact of the "overleaf terms" by the plaintiffs, then there was no *consensus* between the parties. The plaintiffs must prove the contract on which they rely. They must establish that the construction they put upon the terms is the true one and prove that Butterworth & Company agreed to them.

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It may be urged that there is no conclusive reason why the words "date of publication" should refer to that of the last volume rather than to that of the first. Both are referred to in the Robinson terms. If the plaintiffs' proposal is left ambiguous and may refer equally as well to one date as the other, they must fail in the action: *Falk v. Williams*, [1900] A.C. 176.

It is urged by the plaintiffs that the cablegram was an unqualified acceptance of their offer. The cablegram was not signed. In accordance with leave given at the trial a paragraph has been added to the defence setting up the fourth section of the Statute of Frauds. I do not think it is necessary to discuss the question whether the statute affords a good defence or not. The cablegram concludes with the word "writing." This informed the plaintiffs that a letter was being sent to them in regard to the acceptance of the terms and was an intimation that Butterworth & Co. desired to communicate with them upon the subject more fully than was done in the necessarily abbreviated form of a cable despatch. It is not pretended that anything was done, or that the plaintiffs' position was altered in any respect, by reason of the cablegram, between its receipt and the receipt of the letter. When the letter was received the plaintiffs became fixed with knowledge of the terms to which Butterworth & Co. were giving their assent.

The obvious meaning of the word "writing" contained in the cablegram was that a letter was being prepared and that it would be sent to the plaintiffs in the ordinary way. The letter should, therefore, be read along with the cablegram to ascertain Butterworth & Co.'s intention. When the letter was received the plaintiffs were informed what the terms were to which Butterworth & Co. assented, and the understanding upon which they had cabled acceptance.

The transactions that have taken place between the



parties must, no doubt, stand in so far as these transactions have been completed. The plaintiffs have had the sole agency for five years from the publication of volume I. They have ordered from the defendants a very large number of sets of the legal publication in question. The defendants' counsel admit that they are bound to furnish the sets that have been ordered, complete to the end of the work, at the price mentioned in the plaintiffs' proposal. The plaintiffs have had all the benefits they sought to obtain under their proposed terms, save only the extended period of the agency which they claim under their interpretation of the words made use of in their proposal. The onus is upon them to establish a contract which would entitle them to such extended period, and this they have failed to do.

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The appeal should be allowed with costs, the injunction dissolved, and the plaintiffs' action should be dismissed with costs, only one set of costs to be allowed to the defendants.

## COURT OF APPEAL.

### RE RURAL MUNICIPALITY OF THOMPSON.

Before HOWELL, C.J.M., PERDUE and CAMERON, J.J.A.

*Local Option by-law—By-law repealing—Liquor License Act, R.S.M. 1902, c. 101, ss. 66, 68, 76A—Municipal Act, R.S.M. 1902, c. 116, ss. 98, 99, 200, 376—Notice of voting on by-law—Electors voting at unauthorized polls—Directory or imperative requirements of statutes—Curative provision of statute.*

Appeal from judgment of Macdonald, J., granting an application to quash a by-law repealing a Local Option by-law of the Municipality. Held, that section 66 of the Liquor License Act, R.S.M. 1902, c. 101, provides a complete list of specifications as to what should be done by the Council in giving notice to the electors of the object of the by-law and where and when the vote would be taken upon it, and section 68, which provides that all proceedings at and for the purpose of taking the poll shall be conducted in the same manner as voting

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upon any by-law required by the Municipal Act, R.S.M. 1902, c. 116, to be voted upon, does not import the provisions of section 376 of the Municipal Act as to the giving of notice of the by-law and of the voting, so that it is not necessary that such notice should be posted up.

It was objected that 16 of the electors entitled to vote on the by-law voted in a sub-division in which they were not entitled to vote under section 98 or 99 of the Municipal Act, upon certificates given them by the clerk of the Municipality which he was not authorized to give under section 102 of the Act, and it was contended that these votes must be taken as cast illegally and deducted from the number recorded as voting in favor of the by-law which would have left a majority against it.

It appeared, however, that the clerk had given out these certificates without discrimination as between the two parties interested, both of whom had obtained and used them.

*Held*, that it could not be said that these votes were unlawful votes or wholly void, and that the taking of them in the manner set forth was at most an irregularity which did not affect the result of the election and which was, therefore, cured by the provisions of section 76 A added to the Liquor License Act, by 2 Geo. V, c. 34, s.1, if not by section 200 of the Municipal Act.

*Brown v. East Flamborough*, (1911) 23 O.L.R. 534, and *Re Cleary and Nepean*, (1907) 14 O.L.R. 394, distinguished.

Appeal allowed with costs and application dismissed with costs.

DECIDED: 6th May, 1913.

**Statement.** APPLICATION to quash by-law No. 36 of the Rural Municipality of Thompson, being a by-law repealing a Local Option by-law.

Macdonald, J., granted the application and ordered the by-law to be quashed.

The Municipality appealed.

*F. M. Burbidge* for the Municipality, appellants, cited *Re Rapid City*, 10 Dec., 1909, not reported; *Re Shoal Lake*, 20 M.R. 36; *Re South Cypress*, 20 M.R. 142; *Re Portage la Prairie*, 20 M.R. 469; *Re Carman*, 20 M.R. 500; *Blackburn v. Flavell*, 6 A.C. 628; *Re Ryan and Alliston*, 21 O.L.R. 582, 22 O.L.R. 200; *Regis v. Cusac*, 6 P.R. 303, and *Re Brown and East Flamborough*, 23 O.L.R. 533.

*J. B. Coyne* for applicant, respondent, cited *Brown v.*

*East Flamborough*, 23 O.L.R. 533; *Re Cleary and Township of Nepean*, 14 O.L.R. 392; *Re Angus and Widdifield*, 24 O.L.R. 318, and *Fairbairn v. Corporation of Sandwich*, 32 U.C.R. 573. 1913  
Argument.

The judgment of the Court was delivered by

CAMERON, J.A. By-law No. 36 of the Rural Municipality of Thompson repealed a local option by-law previously in force in part of the Municipality. The by-law in question was voted on by the electors on the day of the election of Municipal officers, as fixed by statute. There was a total possible vote of 670 electors, of whom 241 voted for, and 229 against, the by-law, which was accordingly declared carried by a majority of 12 out of a total vote polled of 470.

A motion to quash the by-law came before Mr. Justice Macdonald who, in a written judgment, granted the motion with costs. This appeal is taken from his order.

One of the objections to the by-law is that the clerk of the Municipality had not complied with section 9 of The Municipal Electors Act in failing to distribute copies of the alphabetical list prepared by him, preparatory to a revision of the same, amongst the school teachers of the Municipality. As this alphabetical list was duly revised by the County Court Judge in accordance with the Act, and thereupon became final, this omission of the clerk cannot be regarded as material.

By section 66 of the Liquor License Act, R.S.M. 1902, c. 101, and the amendments thereto, it is provided that, in case of a by-law such as this, the Council, after the first and second readings of the same, shall publish in a newspaper in the Municipality and in the Gazette a notice stating the object of the by-law and that a vote will be taken thereon on the day and at the hour and places fixed under the Act. Such notice is to be published for at least a month and not more than once a week.

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By section 68 of the Act it is further provided that: "At such day, hour and places a poll shall be taken, and all proceedings thereat and for the purpose thereof shall be conducted in the same manner as voting upon any by-law required by The Municipal Act to be voted upon, except that all municipal electors shall be entitled to vote thereon."

By section 376 of The Municipal Act, in case a by-law requires the assent of the electors, the Council shall, by publication in a newspaper in the Municipality and "once in the Manitoba Gazette at least two weeks in advance of the day of voting" (4-5 Ed. VII, c. 25, s. 1), and by posting up in four or more public places, give notice of the object of the by-law and of the time and place of voting thereon.

It is contended that, by section 68, all of the provisions of section 376 of the Municipal Act as to giving notice apply to the case of a by-law under the Liquor License Act in addition to those required by section 66. But this cannot be said to be the intention of the Legislature. If we read the two sections 66 and 68 together it would appear that it was intended that the first should provide a complete list of specifications as to what should be done by the Council in giving notice to the electors of what the object of the by-law was and where it should be voted upon, and the second section provides for the manner of taking the vote by incorporating the appropriate provisions of The Municipal Act. Had the two sections been consolidated there could hardly be any question raised that this was not the proper construction. "Proceedings thereat and for the purpose thereof" must, therefore, be read to mean "proceedings at and for the purpose of taking the poll." The subject of notice or of any other preliminary proceeding is not covered by section 68. The obvious differences in the requirements of notice provided for by section 66 and section 376 indicate that those set forth in 66 are complete in themselves. The history of

these enactments goes to show that this is to be inferred. I refer to the Municipal Act of 1884, 47 Vic., c. 11, s. 130, s-s. (3), and the Liquor License Act of 1889, 52 Vic., c. 15, s. 11, s-s. (c). These enactments have been substantially continued, through subsequent amending and consolidating enactments, to the present day, it being plainly the intention that each should form a separate code.

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I would therefore hold the provisions of sub-section (b) of section 376 of The Municipal Act are excluded by the specific provisions set forth with particularity in section 66 of the Liquor License Act.

It appears that certain of the electors, some 16 in number, procured certificates from the clerk of the Municipality and voted thereon in a subdivision in which they were not rated. It is contended that these 16 votes must be taken as illegally cast and that they must be deducted from the number of those recorded as voting in favor of the by-law. On the facts, this would be a violent presumption to make, as the evidence is that the clerk gave out these certificates without discrimination as between the two parties interested, both of whom obtained and used them.

Under the provisions of The Municipal Act, section 98, each elector may vote in each ward in which he has been rated; but, in case of voting for mayor or reeve, he is limited to one vote only.

By section 99 of The Municipal Act, where an elector is entitled to vote in more than one ward or subdivision, he "shall vote" for reeve in a rural municipality in the ward or subdivision in which he is resident. If he is a non-resident or is not entitled to vote in the ward or subdivision in which he resides, then he is to vote where he first votes and there only. A penalty is affixed by sec. 100 for anyone who votes more than once, but there is no penalty in the case of an elector who, being entitled to

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vote in one ward or subdivision, votes in another, but only once, at the same election. Under sec. 102 the clerk may give a certificate to an elector acting as deputy returning officer or as agent, entitling him to vote at a poll other than the one where he is entitled to vote. Under section 105 a non-resident elector may procure a certificate from the clerk, upon which he can vote at any poll. There is no other provision than the above providing for certificates, nor is any penalty imposed on the clerk for issuing unauthorized certificates, or on any elector procuring a certificate to which he is not entitled.

Under section 95 it is the duty of the clerk to furnish each deputy returning officer with a certified copy of the last revised list of electors for the "municipality, ward or subdivision," "for the purpose of enabling the persons named in such lists to vote at the election" (sec. 97).

Any person offering to vote at an election under The Liquor License Act may be challenged and must, if requested, take the oath prescribed by section 69 of The Liquor License Act. He must, amongst other things, swear that he is the person named on the list shewn to him, that he has not voted before and is entitled to vote at the election.

By section 390 of The Municipal Act (incorporated in the Liquor License Act by sec. 68) the proceedings at the poll, where a by-law requiring assent is voted on, shall be the same as nearly as may be as at municipal elections, and sections 81 and 90 to 105 and 109 to 201 of that Act are made applicable.

What is the effect of a ballot cast by a voter on a by-law in a poll other than that where his name appears, but votes in a subdivision where he is not rated? We may set aside the certificates issued in this case as being altogether unwarranted by the statute. The effect of section 98 is enabling and permissive; it is not imperative in the sense that section 99 is. If an elector on a by-law

under the Liquor License Act presented himself at a poll in a subdivision where he was not rated, showed that he was on the certified copy of the voters' list for the municipality supplied by the clerk (as appears to have been done in this case), expressed his willingness to take the oath prescribed and took it and the deputy returning officer gave him a ballot which he cast, then it seems to me difficult to say that this vote is wholly void. He is a "voter" entitled to vote on any by-law, as that term is defined in the interpretation clause of The Municipal Electors Act. The act of the deputy returning officer in handing out a ballot in these circumstances would not be justified by the language of section 113, sub-section (a). Nevertheless an elector entitled to vote in the municipality and to vote once only has voted, and the failure of the deputy returning officer to observe the provisions of the above sub-section could hardly be allowed to have the effect of depriving the voter of his vote. It surely cannot be said that the vote so cast was an unlawful vote or that it is to be regarded "the same as if the vote had never been cast," as remarked by Chancellor Boyd in *Brown v. East Flamborough*, 28 O.L.R. 535, citing *Reg. v. Tewkesbury*, L.R. 3 Q.B. 629, 636.

I think it is impossible to say that these 16 votes were void or illegal votes. They certainly are not of such a class as were the 5 votes of married women (who had no right whatever to vote) that were excluded in *Re Cleary v. Nepean*, 14 O.L.R. 394, or the 26 spoiled ballots that were excluded from the total in *Re Brown v. East Flamborough*, 23 O.L.R. 534. In both these cases the votes attacked came within the class of those referred to in *Reg. v. Tewkesbury*, *supra*; viz.: those which "are to be considered as thrown away, i.e. as if the voters had not given any vote at all," p. 636. But in this case the votes were those of voters unquestionably entitled to vote at the election here in question. The deputy returning officers

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were in error in acceding to the request for ballot papers; but they did give them out and the ballots were cast by electors whose names were on the last revised voters' lists for the municipality and entitled to vote on the by-law.

According to the returns, therefore, the result announced properly expresses the intention of the electors of the whole municipality who voted, and it seems to me that we cannot give weight to this objection and that this is a case where, on the evidence, the proceedings were conducted substantially in accordance with the requirements of the Act, and whatever non-compliance or irregularity as to the taking of the poll there may have been did not affect the result of the voting, and it is impossible to give effect to this objection.

I would submit with deference that the order appealed from must be reversed and the application to quash dismissed. The municipality must have the costs of this appeal and of the motion to quash.

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### GILL V. YORKSHIRE INSURANCE CO., LTD.

Before GALT, J.

*Insurance on live stock—Sale of goods insured—Assignment of insurance on goods sold made prior to loss without consent of insurers—Right of insurers to be subrogated to claim of insured—Principal and agent—Condition as to notices of illness and death of animal insured—Arbitration and award—Waiver—Acceleration of time for payment of promissory note under provision thereof—Construction of contract.*

1. The buyer of goods is not entitled to claim from the seller the benefit of any insurance he has on them unless the seller has contracted to give him such benefit.

*Martineau v. Küthing*, (1872) L.R. 7 Q.B. 436, followed.

2. An assignment, made after the sale of a horse and before its death, of the benefit of an insurance on it to the purchaser, has no effect to vest in the purchaser any right to the insurance money unless the insurers consent thereto.

*Mac Gillivray on Insurance Law*, p. 766 ; *Lynch v. Dalsell*, (1729) 4 Bro. P.C. 431, and *Saddlers Co. v. Badcock*, (1743). 2 Atk. 554, followed.



3. A letter from the agents of the insurance company to one of the purchasers, who had been making inquiries about the insurance on the horse and had requested to be put at ease with regard to it, stating "we are holding your interest in this insurance fully covered, but subject to the veterinary surgeon's report on the stallion and also subject to one-third reduction from his quotation of the present market value of the stallion," held, under the circumstances set forth in the judgment, not to show any consent by the insurance company to the assignment of the insurance, even if the letter had been binding on the company.
  4. Although the policy required that notice of the illness or death of the animal should be given within 24 hours direct to the Company, whose head office for Canada was in Montreal, yet notice to the chief agents of the Company for Manitoba, appointed pursuant to the Manitoba Insurance Act, was held to be a sufficient compliance with the condition, if given in time.
  5. A notice of the illness of the stallion, given by one of the purchasers *within 24 hours after knowledge of the illness reached the plaintiffs*, the sellers, was a sufficient compliance with the condition requiring notice of the illness to be given by the insured *within 24 hours of the illness* to enable the plaintiffs to recover on the policy to the extent of their insurable interest in the stallion, although the illness commenced three days before to the knowledge of that purchaser.
- Such a condition should be construed most strictly against the Company, and, if applied under all circumstances, is most unreasonable.
6. Notice of the death of the stallion given verbally to the agents the same day, and communicated by them to the Company's office in Montreal by telegram, was a sufficient compliance with the condition requiring notice of the death to be given in writing direct to the Company within 24 hours.
  7. The insurers were entitled, on payment of the plaintiffs' claim, to be subrogated to that extent to the right of the plaintiffs against the purchasers of the horse upon promissory notes for \$1,000 given for part of the purchase money, the purchasers not having acquired any right to any benefit of the insurance on it.
- Such right of subrogation arises upon making payment without any assignment or condition and without making any express reservation, *MacGillivray*, p. 733.
8. A provision in a promissory note payable at a given date enabling the payee, if for any reason he should consider the note insecure, to declare it due and payable at any time, should be construed strictly; and, assuming that circumstances have arisen justifying the payee in acting upon the provision, it is necessary for him to "declare" the note due and payable before he can sue upon it. It is not sufficient merely to demand payment or security within a stated time, threatening action on default in so doing.
  9. A condition in an insurance policy providing for arbitration on any claim under it as a condition precedent to any right of action on the

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policy may be waived by the company, and such waiver given to the insured might be relied on by a purchaser of the insured property claiming under an assignment of the insurance, if valid.

10. The plaintiffs, having sold the stallion and received all but \$1,000 of the purchase money, were entitled to recover only two-thirds of that sum and accrued interest thereon, as the policy, although it insured the animal for \$3,000, limited the liability of the Company to "two-thirds of the loss suffered by the insured."

DECIDED: 28th May, 1913.

**Statement.**

IN this action the plaintiffs, as executors of Thomas Newton, deceased, claimed payment of certain insurance moneys arising out of an insurance of a stallion, and the plaintiffs claimed against the defendants Kitching and Kenway payment of two lien notes given by them on the purchase of the stallion shortly before its death.

*J. L. M. Thomson* for plaintiffs.

*R. M. Dennistoun, K.C.*, for Yorkshire Insurance Co.

*J. F. Davidson* for Kitching and Kenway.

GALT, J. The circumstances out of which the action and counterclaim by Kitching and Kenway arise are as follows:

In July, 1911, Thomas Newton signed an application for insurance on the stallion "Salwick Hero," stating its market value to be \$5,000, and asking for \$3,000 insurance. On July 19th, 1911, the defendant Insurance Company issued a policy in favor of Thomas Newton for \$3,000 for one year. The policy contained the following provisions:

"Now this policy witnesseth that, if, after receipt hereof and payment by the insured to the Company of the under-noted premiums for an insurance up to noon on the date of the expiry of this policy, any animal described in the schedule below shall die from any accident or disease hereby insured against as after mentioned, and occurring or contracted after the commencement of the Company's liability hereunder, and otherwise defined in the aforesaid Proposal, the Company shall be liable to pay to the Insured, after receipt of proof satisfactory to the Directors, Two-thirds of the loss which the said insured shall so

suffer, but not exceeding the amount for which said animal is insured."

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Under the heading "Definition of Tables and Risks Covered," the policy insures "Stallions against death from Accident or Disease."

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It also contains the following provision:

"Now be it hereby known that the capital stock or funds of the Company shall alone be liable to pay or make good to the Insured, or to the Representatives of the insured, being successors in interest, all such loss not exceeding in amount the respective sums of money hereinbefore mentioned.

"Provided that this Insurance shall, at all times, and under all circumstances, be subject to the conditions endorsed hereon and which are to be taken as part of this policy."

Amongst the conditions are the following:

"6. The Insured shall give notice direct to the Company within 24 hours of foaling—premature or otherwise, operation performed, *illness*, lameness, or any accident or injury to any animal hereby insured, and shall comply with all such directions as the Company may give," etc.

"8. On the death of any animal hereby insured, the Insured shall within 24 hours give notice thereof in writing direct to the Company and shall, if required by the Company, at his own expense have a post mortem examination made by a qualified Veterinary Surgeon, and shall not remove or part with the carcase until after the expiration of 24 hours. The Insured shall, within 21 days thereof, furnish to the Company particulars of the claim on their printed form together with all such information, veterinary certificates, and satisfactory proof as to the death, identity and market value of the animal, as the Directors may require, and shall, if so requested, furnish a statutory declaration in connection with any claim."

10. Setting forth a condition that, if any difference of any kind whatsoever should arise between the Company and the Insured, or his representatives, in respect of the policy, the same should be referred to arbitration as therein

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provided, and it was thereby expressly stipulated and declared that it should be a condition precedent to any right of action or suit upon the policy that the award of such arbitrator, arbitrators or umpire of the amount of the claim, if disputed, should be first obtained.

Newton borrowed from the Bank of Hamilton moneys to enable him to pay the premium, \$210, and in order to secure the Bank it was arranged that the policy should express the loss, if any, to be payable to the Bank of Hamilton. Newton died on November 11, 1911, and plaintiffs were appointed his executors. The claim of the Bank of Hamilton was paid off by the executors, and in March, 1912, they employed Nelson Wilson, an auctioneer, to sell the stallion. Advertisements of sale were published in Winnipeg papers and also at Treherne, and by posters throughout the district.

The defendants Kitching and Kenway, having seen the advertisement in one of the Winnipeg papers, made inquiries as to whether the stallion was insured and, having ascertained that he was insured by the defendant Company, the defendant Kenway called at the office of Oldfield, Kirby & Gardner, agents for the insurance company, and ascertained particulars of the insurance which had been effected. Apparently Kenway's conversation was with Edwin S. Craig, Chief Clerk of the Live Stock Department. The sale took place on March 27th, when 150 or more farmers and others attended and the stallion was purchased by Kitching and Kenway for \$1500. The auctioneer stated at the sale that all the documents connected with the horse would be delivered to the purchaser. It appeared that certain certificates of pedigree and transfer were then in the possession of the executors or of the auctioneer, but nothing whatever was said about insurance.

The terms of sale were \$500 cash and the balance to be secured by two lien notes of \$500 each, one payable on

April 1, 1913, and the other April 1, 1914, with interest at 7 per cent. per annum, and the defendants further agreed to pay interest at 10 per cent. per annum after maturity of each note until paid.

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The stallion was delivered to the purchasers. On Saturday, April 13th, the horse took sick at Rathwell, Manitoba, of which the defendant Kitching was aware on that date. The defendant Kenway was at the time himself sick in bed in Winnipeg.

Kenway's evidence as to when he first heard of the horse being sick varies. In one portion of his evidence he states that Kitching telephoned him on Saturday night, and in another portion of his evidence he says he did not get the telephone message until Monday. None of the executors heard of the horse's sickness until Monday, the 15th.

On that day, Charles Wilson, one of the executors, heard that the horse was sick and went to see him. Wilson then got the executors together with a view to arranging about the insurance, which seemed likely to fall in. Kitching was there at the time and as a result the executors executed under seal an assignment to Kitching and Kenway of the policy and all benefit to be derived therefrom, save and except the sum of \$1,000 and interest thereon from the 27th day of March, 1912, the said sum of \$1,000 being the balance owing on the purchase price of the stallion.

Kenway says that on Tuesday, April 16th, he telephoned about ten o'clock in the forenoon to Oldfield, Kirby & Gardner notifying them of the sickness of the horse, and subsequently he personally went to their office and notified them. At about two o'clock in the afternoon on that day Kenway was informed by telephone that the horse was dead. He then went again to the office of Oldfield, Kirby & Gardner and notified them.

On the same date Frank McMurray, one of the part-

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ners in the Oldfield, Kirby & Gardner firm, who had charge of the Live Stock Department, notified the head office of the Yorkshire Insurance Company, at Montreal, of the death of the horse by wire as follows:

"Policy seventy-six thousand seven hundred and two Newton stallion died today at Rathwell, Manitoba; sold three weeks ago to Kitching and Kenway, who advised us of sale pending signature to assignment not yet received; stallion attended by Dr. Lipsett whom Dr. Torrance says thoroughly capable and reliable; wire instructions."

A large amount of documentary evidence of correspondence between the defendant Company and their Winnipeg agents was put in.

Mr. Craig states in his evidence that Kenway rang him up by telephone and said that, as he was not in charge of the horse, he would like to be put at ease with regard to the insurance, but that Kenway said nothing about the horse being sick. As a result of this request, Craig wrote a letter on Tuesday, 16th April, to Kenway as follows:

"Re Policy 76702—Insurance on Stallion—Salwick Hero.

"Dear Sir:

"Referring to your telephone message to-day we beg to advise you that we are holding your interest in this insurance fully covered, but subject to the Veterinary Surgeon's report on the Stallion, and also subject to one-third reduction from the Veterinary Surgeon's quotation of the present market value of the said Stallion.

"We await policy at your earliest convenience.

"Yours truly,

"Oldfield, Kirby & Gardner.

"Per Edwin Craig."

Kenway denies that he had requested Craig to send him any such letter as above.

On May 22, 1912, Messrs. Bonnar, Trueman & Co., solicitors, wrote to Oldfield, Kirby & Gardner on behalf of the executors, with a view to payment of the insurance, and, on May 29th, the solicitors wrote on behalf of Messrs.

Kenway and Kitching also. Messrs. Bonnar, Trueman & Co. also took up the question of arbitration under the policy with Messrs. Oldfield, Kirby & Gardner, and as a result the defendant Company waived a reference to arbitration. This waiver nominally was given in favor of the plaintiff executors and the defendant Company now seek to rely upon this condition as against Kenway and Kitching's counterclaim.

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I think that, having waived arbitration so far as the plaintiffs were concerned, and the defendants Kitching and Kenway having been made parties defendant with the consequent right of counterclaiming if they so desired, the defendant Company is not now in a position to insist on an arbitration of their co-defendants' counterclaim.

Dealing now with the various claims set up by the plaintiffs and defendants respectively, the first question to decide is as to the plaintiffs' claim against the Yorkshire Insurance Company, Limited.

When the plaintiffs sold the stallion on March 27th for \$1500 and received \$500 in cash, their insurable interest was reduced to \$1000, and accruing interest, and under the terms of the policy the plaintiffs, unless debarred by one or more conditions of the policy, are entitled to two-thirds of the \$1000 and interest.

The defendant Company pleads that, under condition 6 of the policy, the insured was bound to give notice direct to the company within 24 hours of the illness of the animal insured; and also, under condition 8, that, upon the death of the stallion, the insured was bound within 24 hours to give notice thereof in writing direct to the Company, and within 21 days thereafter to furnish the Company with particulars of the claim on their printed form, together with all such information, Veterinary certificates and satisfactory proof as to the death, identity and market value of the animal as the directors might require, and to

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furnish, if so requested, a statutory declaration in connection with any claim.

The defendant Company has its head office for Canada in the City of Montreal. Documents were put in by the plaintiffs showing that Walter T. Kirby (a member of the firm of Oldfield, Kirby & Gardner) was in 1907 appointed, pursuant to The Manitoba Insurance Act, agent of the Company in the Province of Manitoba, and that the chief agency of the Company within the said Province was at the office of said Walter T. Kirby.

Mr. Dennistoun, on behalf of the defendant Company, also filed, subject to objection, a book of instructions given by the Company to all their agents, and argued that the limitations of authority contained in these instructions must be recognized by the Court in adjudicating upon the verbal and written communications which the plaintiffs and the defendants Kenway and Kitching had with Oldfield, Kirby & Gardner. The book is styled "Agents' Guide Book—Private and Confidential." I do not think that any such private instructions communicated by a principal to its agent at a general agency can bind parties dealing with the agent. I think that for all practical purposes the dealings of Messrs. Oldfield, Kirby & Gardner may be looked upon as having been done by the Company itself.

In construing the conditions printed by the defendant Company, it must be borne in mind these conditions are framed with every care to the Company's interests, and that they should not be so construed as to furnish a trap to farmers and others throughout the country who might have been induced to insure their live stock with the Company.

None of the executors were aware of the illness of the stallion until Monday, April 15th, the day on which they assigned the policy; and they left it to the purchasers to notify the Company so far as might be necessary. Within



24 hours thereafter Kenway notified Oldfield, Kirby & Gardner, and they, the same day, notified the head office by wire.

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If the stipulated 24 hours commence to run at the first moment when an animal is affected by illness I should think it probable, or certainly possible, that the illness would not be discovered, even by the man in charge of the animal, until the time limit had almost or quite expired. The condition, when applied to parties residing out in the country, is certainly most unreasonable.

Counsel for the defendant Company pointed out that notice is to be given direct to the Company (meaning at the head office in Montreal), and that, if the plaintiffs relied upon Kitching and Kenway to give all requisite notices, the defendant Kitching was well aware of the stallion's illness on Saturday, April 13th, and should have given notice accordingly.

Condition 6 does not specify whether the notice of illness is to be verbal or in writing. If verbal, and if Kitching had himself taken the first train for Montreal to give it, he could not have reached the Head Office during business hours before Tuesday, on which day the notice was in fact received. If in writing, a letter could not have reached Montreal any earlier. There is nothing in the condition requiring a telegram. I think, therefore, that condition 6 was sufficiently complied with.

For the same reasons, I think that the notice in writing of the death of the animal within 24 hours was given and received by the Company in compliance with condition No. 8.

With regard to the obligation cast upon the insured of furnishing particulars of the claim on the Company's printed form within 21 days after the death of the animal, I find that the defendant Company instructed their agents on April 17th, that they did not think it advisable to furnish either the assured or Messrs. Kitching and Ken-

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way with the Company's printed claim forms, preferring that their statements should be embodied under a separate declaration, and thereupon the solicitors for the various claimants supplied the Company with all necessary information as to their claim. See, amongst others, Exhibits 14, 15 and 27.

In the result I find the defendant Company liable to the plaintiffs for two-thirds of \$1,000 and interest at 7 per cent. (stipulated for on the face of the lien notes) together with the costs of this action.

The defendant Company, however, claimed in their defence that, in the event of being found liable to the plaintiffs, they should be subrogated to the rights of the plaintiffs against the defendants Kitching and Kenway on the two lien notes. The insurers' right of subrogation arises whenever he pays the claim and it arises upon payment of a partial as well as upon payment of a total loss, and although the insurers are not entitled to the benefit of what is recovered till the assured has received a full indemnity. See *McGillivray on Insurance Law*, p. 733, and cases cited.

But, inasmuch as the two notes represent \$1,000 and interest at 7 per cent. from 27th March, 1912, and the defendant Company is only liable under their policy for two-thirds of the insured's loss, the defendant Company must either pay to the plaintiffs the other one-third of the loss now, or as soon as they have collected it from Kitching and Kenway. The insurer upon making payment is not required to make any express reservation of, or claim to, the assured's rights. In the absence of anything to the contrary the right of subrogation follows without any assignment or condition. See *McGillivray*, p. 734.

The next claim to be dealt with is that of the plaintiffs against the defendants Kitching and Kenway on the lien notes. The two lien notes for \$500 each were dated

March 27th, 1912, and were payable respectively on the 1st day of April, 1913, and the 1st day of April, 1914. Each contains the following stipulation:

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"I further agree to furnish security satisfactory to them (i.e. the executors) at any time if required, and, if I fail to furnish such security when demanded or if default in payment is made, or should I sell or dispose of or mortgage or attempt to sell the under-mentioned land which I own, or if for any reason executors should consider this note or any renewal or renewals thereof insecure, they have full power to declare it and all other notes made by me in their favor due and payable at any time and suit therefor may be entered, tried and finally disposed of in any court having jurisdiction."

On August 8th, 1912, Mr. Thomson, solicitor for the plaintiffs, wrote to the defendant Kenway: "On behalf of the executors, and exercising their rights under the lien notes signed by you herein, I hereby demand payment of the amount of said notes, \$1,000 and interest from the 27th March, 1912, at 7 per cent." And on August 26th, Mr. Thomson wrote to Kenway:

"Since the death of the horse the notes are not good security, and on behalf of the executors I hereby again demand payment of said notes or satisfactory security for the payment of said moneys. If the required security or said moneys be not delivered to me within four days from date, I shall enter action against you for the full amount of the notes. Please take this as final notice."

The provision in the said notes for accelerating their payment is very stringent and should be construed strictly. Assuming that circumstances had arisen justifying the plaintiffs in acting upon the provision, it was necessary for them to "declare" the notes due and payable. This they did not do, as the letter above referred to merely demands payment of notes which had not become due. For this reason I am of opinion that the plaintiffs have not brought themselves within the provision in

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J. The action as against the latter defendants must be dismissed with costs.

I proceed now to consider the counterclaim of Kitching and Kenway against both the plaintiffs and the Yorkshire Insurance Co., Limited. They claim \$3,000. I find upon the evidence that, when the horse was sold by the plaintiffs to the defendants Kitching and Kenway, no mention was made of any insurance, and it was not part of the contract of sale that said defendants should have the benefit of the existing insurance upon the horse. Prior to the sale the defendant Kenway had interviewed Mr. Craig, chief clerk under Mr. McMurray in the Live Stock Insurance Department of Oldfield, Kirby & Gardner, and I gather from the evidence that Kenway ascertained the facts relating to the existing insurance and the terms on which he himself could insure the animal. After the sale on March 27th the Insurance Company was duly notified of it and raised no objection. The evidence of Kenway, McMurray and Craig as to certain interviews between them is very conflicting, Kenway asserting that he was endeavoring to get the benefit of the existing insurance, and McMurray and Craig respectively stating that the conversations were with reference to the right of Kenway and Kitching to re-insure the animal.

The general rule of law is that the buyer of goods is not entitled to claim from the seller the benefit of the seller's insurance unless the seller has contracted to give him such benefit. See *Martineau v. Kitching*, L.R. 7 Q.B. 436.

In the present case, as I have found, there was no such contract on the part of the plaintiffs. On the other hand, when the horse was taken sick and was *in extremis* on April 15, 1912, the plaintiffs executed an assignment of the policy and all the benefits to be derived thereon, save

and except the sum of \$1,000 and interest thereon from the 27th day of March, 1912. The policy in question here is so expressed as to be a contract of indemnity and in this respect is similar to an ordinary contract of fire insurance.

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*MacGillivray*, at p. 765, gives the following as a result of the authorities:

"The policy promises to indemnify A against loss by fire, for instance. A can assign his right of action against the Company to B so that, if A suffers a loss, B may recover in respect of it, but he cannot, without the Company's consent, convert their promise to indemnify A into a promise to indemnify B, because that would not be an assignment but an attempted novation."

Probably few propositions of insurance law are based upon older authority than the above, which was laid down in *Lynch v. Dalzell*, (1729) 4 Bro. P.C. 431, and *Sadler's Co. v. Badcock*, (1743) 2 Atk. 554.

I feel quite satisfied that the versions given by McMurray and Craig as to their interviews with Kenway should be accepted rather than Kenway's. Of course, it is quite possible for an insurance company to depart from ordinary business principles and grant or continue an insurance for double the amount of an animal's value. The question is whether the defendant Company has in this case done so. In answer to an enquiry put by myself, Mr. Davidson, counsel for Kitching and Kenway, admitted that the strongest evidence he could point to on behalf of his clients was the letter sent by Craig in the name of Oldfield, Kirby & Gardner to Kenway on the morning of April 16th. Assuming in favor of Kitching and Kenway (but not deciding) that this letter is binding upon the defendant Company, I think it entirely fails to establish the defendants' counterclaim. It informs Kenway that the agents "are holding your interest in this insurance fully covered, but subject to the Veterinary Surgeon's report on the stallion and also subject to one-third reduction from the Veterinary Surgeon's quotation

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of the present market value of the said stallion." It appears to me that this letter entirely confirms the testimony of McMurray and Craig that they were expecting an application by Kitching and Kenway for re-insurance of the stallion. On that day the stallion died, so that the market value of it was absolutely nil. It is absurd to suppose that any re-insurance could have been effected.

In my opinion Kitching and Kenway took nothing by the assignment of April 15th, and they never afterwards acquired any rights against the defendant Company. Having reached a decision adverse to the counterclaim on the merits, I think it unnecessary to deal with certain formal objections raised by the parties during the argument.

Judgment will accordingly be entered as follows:

(a) In favor of the plaintiffs as against the defendant Company for two-thirds of \$1,000 and interest thereon from March 27, 1912, with costs.

(b) Upon payment of said amount the defendant Company is entitled to be subrogated to the plaintiffs' rights against the defendants Kitching and Kenway on the lien notes to the extent of the amount paid.

(c) The plaintiffs' action against Kitching and Kenway on the lien notes is dismissed with costs.

(d) The counterclaim of Kitching and Kenway against the plaintiffs and the defendant Company is dismissed with costs.

## ABRAMOVITCH V. VRONDESSI.

Before THE REFEREE.

*Mechanics' Lien—Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, s. 22—Parties to action—Registered owner a necessary party.*

Under section 22 of the Mechanics' and Wage Earners' Lien Act, R.S. M. 1902, c. 110, a claim of lien under the Act cannot be "realized" unless the person who is the registered owner of the land at the time of the commencement of the action is made a party to it, or unless there is some other action, to which such owner is a party, pending in which the claim may be "realized," and, in such case, although the lien has been duly registered within the time required by the Act, it absolutely ceases to exist unless some action to which the registered owner is a party has been commenced under the provisions of the Act, within the period of 90 days prescribed by the Act.

It is too late after the expiration of that period to amend by adding the registered owner as a party defendant.

DECIDED: 2nd June, 1913.

THIS was an action brought under The Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, to enforce a mechanics' lien for work done in building houses for the defendant Vrondessi upon land belonging to him at the time of the doing of the work. Statement.

After the registration of the plaintiff's lien, but prior to the commencement of the action, the title to the property had been transferred to and had become vested in one Anthony Calis, by certificate of title under The Real Property Act.

The plaintiff's lien was the only one that had been registered under the Act.

Anthony Calis had not been made a party to the action which came on for trial nearly a year after it was begun.

The action was referred to the Referee for trial pursuant to 7 and 8 Edw. VII, c. 28, s. 12.

*W. J. Donovan* for plaintiff.

*W. B. Towers* for Vrondessi.

*R. D. Guy* for Vlassis.

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THE REFEREE. By section 22 of the Act:

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"Every lien which has been duly registered under the provisions of this Act shall absolutely cease to exist after the expiration of ninety days after the work or service has been completed or materials have been furnished or placed, or the expiry of the period of credit, where such period is mentioned in the claim of lien registered, unless in the meantime an action be commenced to realize the claim under the provisions of this Act or an action is commenced in which the claim may be realized under the provisions of this Act, and a certificate of *lis pendens* in respect thereof according to Form No. 6 in the schedule hereto be registered in the proper registry office, or land titles office."

This section requires that an action to realize "the claim," or an action in which "the claim" may be realized, must be commenced within the period named, otherwise the lien "shall absolutely cease to exist," and I am satisfied that, in an action to realize the claim of lien on the land, the person who is the owner of the land at the time of the commencement of the action is a necessary party.

There has, therefore, in this case been no action, in which this claim can be realized, commenced within the prescribed time and I hold that the plaintiff's lien has absolutely ceased to exist, as the owner cannot be made a party defendant by amendment after the lapse of the 90 days.

There will, however, be judgment against the defendant Vrondessi personally for the balance of the contract price, \$1,800.

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## COURT OF APPEAL.

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## CAMPBELL V. CANADIAN NORTHERN RY. CO.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*Railways—Railway Act, R.S.C. 1906, c. 37, s. 279—Negligence—Leaving cars on highway—Injury to persons crossing tracks—Contributory negligence—Highway crossing—Order of Board of Railway Commissioners—User—Acquiescence—Infant.*

The adult plaintiff, driving his automobile, was approaching a highway crossing of the defendants' railway. His view of the track on the right of the crossing was obstructed by a long string of box cars standing on a siding parallel to the main track and extending partly over the highway on that side. The highway, 66 feet wide, was also obstructed by some cars on the left side, one of which was partly over the highway, so that there was only a width of 25 feet between the cars. He knew that the crossing was a dangerous one and looked and listened carefully for engines or trains coming.

He did not hear any bell or whistle sounded and the cars on the siding prevented him from seeing an approaching engine. He reduced his speed to eight miles an hour and proceeded to cross the railway when his automobile was struck by a yard engine coming from the right along the main track, and practically demolished. The adult plaintiff and his daughter aged two years were both severely injured.

*Held*, that the adult plaintiff had not been guilty of negligence disentitling him to recover, as he had taken such precautions as the ordinary man in his position would take and was not bound to reduce his speed further as suggested by the trial judge.

*Held*, also, that the blocking of portions of the highway crossing by the defendants' cars, in contravention of section 279 of the Railway Act, was an act of negligence rendering the defendant company liable in damages to the plaintiff, although the trial Judge's finding that the engine's bell and whistle had been sounded in compliance with the statute could not be reversed on the appeal.

The highway in question was opened up to the full width of 66 feet after the construction of the railway by a by-law of the City of St. Boniface showing the street on both sides of the crossing, but not the crossing itself, colored pink on a plan, followed by an order of the Board of Railway Commissioners for Canada, made upon the application of the City, and authorizing the construction of the street across the track of the defendants as shown on the plan and profile filed, and the full width of the highway at the crossing was afterwards used by the public with the knowledge and acquiescence of the defendants.

*Held*, that no further by-law of the City was necessary to constitute the street a public highway to the full width, notwithstanding the want of the pink coloring on the crossing shown on the plan.

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*Re Reid and Canada Atlantic Ry. Co.*, (1905) 4 Can. Ry. Cas. at p. 275, and *C.P.R. Co. v. Toronto*, [1911] A.C. at p. 477, followed.

Verdict for the adult plaintiff for \$2,500 damages and, for the infant, \$500.

*Per* HAGGART, J.A. The adult plaintiff was guilty of such contributory negligence that he should not recover, but this would not prevent a recovery by the infant plaintiff for her damages suffered through the defendants' negligence.

*Mills v. Armstrong*, (1888) 13 A.C. 1; *Eisenhauer v. Halifax, &c. Ry. Co.*, (1908) 12 Can. Ry. Cas. 168; *Mathews v. London St. Tram. Co.*, (1888) 58 L.J.Q.B. 12, and *Sangster v. Eaton*, (1895) 24 S.C.R. 708, followed.

*Waite v. N.E.R.*, (1858) E.B. & E. 719, not followed.

DECIDED: 9th June, 1913.

**Statement**      THIS action was brought by the plaintiff for himself and as next friend to his infant daughter, to recover damages by the collision of his motor car with a switch engine belonging to the defendant Company, which collision was due, it was alleged, to the negligence of the defendants.

The case was tried before Metcalfe, J., who held that plaintiff's want of care contributed materially to the accident and entered judgment for the defendants with costs.

The plaintiffs appealed.

*H. J. Symington* for plaintiff, appellant, cited *Eisenhauer v. Halifax*, 12 Can. Ry. Cas. 168; *Mills v. Armstrong*, 13 A.C. 1; *C.P.R. v. Toronto*, [1911] A.C. 461; *Bilbee v. London B. & S.C. Ry.*, 18 C.B.N.S. 583; *Jenner v. S.E.R.*, 105 L.T.R. 131; *Smith v. Niagara, etc., Ry.*, 4 Can. Ry. Cas. 220; *Canada Atlantic v. Henderson*, 29 S.C.R. 632; *Wellman v. C.P.R.*, 10 M.R. 82; *Hollinger v. C.P.R.*, 20 A.R. 244; *Peart v. G.T.R.*, 10 A.R. 191; *Johnson v. G.T.R.*, 21 A.R. 413; *Tyson v. G.T.R.*, 20 U.C.R. 256; *Vallee v. G.T.R.* 1 Can. Ry. Cas. 338; *McLeod v. C.N.R.*, 9 Can. Ry. Cas. 39; *The Great Holme*, [1897] A.C. 596; *The Mediana*, [1900] A.C. 113; *The Argentino*, 14 A.C. 519; *Waite v.*

*N.E.Ry.*, 1 E.B. & E. 719, and *Re Reid and Canada Atlantic Ry.*, 4 Can. Ry. Cas. 272.

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Argument.

*O. H. Clark, K.C.*, for defendants, respondents, cited *Jones v. G.T.Ry.*, 18 S.C.R. 696, 16 A.R. 37, 43; *McKay v. G.T.Ry.*, 34 S.C.R. 81, 97; *Peterson v. Bitulithic*, 22 W.L.R. 398, 24 W.L.R. 20; *B. & B., Ltd.*, v. *McLeod*, 2 W.L.R. 274; *Batte v. Gillies*, 16 O.L.R. 558; *Berrill v. Dominion Auto. Co.*, 24 O.L.R. 551; *Hollinger v. C.P.R.*, 20 A.R. 250; *Weir v. C.P.R.*, 16 A.R. 100; *Wakelin v. London & S.W. Ry.*, 12 A.C. 141; *Mills v. Armstrong*, 13 A.C. 1, 95; *Parent v. The King*, 13 Ex. Ct. Rep. 93; *Roberts v. Hawkins*, 29 S.C.R. 218, and *Waite v. N.E.Ry.*, 1 E.B. & E. 719.

PERDUE, J.A. On 10th July, 1912, the plaintiff was driving an automobile from St. Boniface to Transcona. Along with him were an acquaintance named Purvis, and plaintiff's wife and his two young children, one of them being the infant plaintiff, aged two years, and the other a still younger child in its mother's arms. They travelled along Marion Street in St. Boniface, which is the highway generally taken by persons going from St. Boniface to Transcona. That street crosses the defendants' right-of-way diagonally, the angle between the street and the railway as one travels easterly to Transcona being about thirty-three degrees on the left or northerly side, and the angle upon the right hand side being about a hundred and forty-seven degrees. Three lines of defendants' railway cross Marion street at this point. The defendants had for some time used two of these lines for the purpose of leaving cars upon them. The main line ran in the centre, the lines used for storage purposes being upon each side of the main line, all being upon the one right-of-way and the one grade. At the time when the accident in question occurred, and for some time previously thereto, a number of cars had been left standing upon the side tracks. At the

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time of the accident four cars were standing partly upon the street at the crossing. To the right, as one travelled easterly, a long line of cars had been left standing on the nearer of the side tracks, the car nearest the crossing being partly on the street and the northerly end being only seven feet from the plank crossing over the rails. This line of cars would be within five or six feet of the cars passing along the main line. There were also cars on the left of the crossing. The effect of the long line of cars to the right was to obstruct the view of the main line for a considerable distance.

When nearing the crossing the plaintiff slowed up to about eight miles an hour. Both he and the man Purvis, who was with him in the car, heard no whistle or sound of bell and saw nothing approaching on the railway from either side, although they both looked and listened, knowing that the crossing was a dangerous one. Another party who was travelling behind them at a distance of 150 yards did not hear a bell or whistle or see an engine coming. The cars which were encroaching on the street from either side left an opening at the crossing of about twenty-five feet. As the plaintiff attempted to run his automobile through this opening he collided with an engine which was proceeding northerly along the main line. In this collision the automobile was greatly damaged and the plaintiff and the elder of the two children were severely injured. The accident occurred at 5.45 p.m. on a calm, clear day.

As might be expected in a case like this, there is flat contradiction between the plaintiff's witnesses and the defendants' employees as to whether the statutory warning was given by the persons in charge of the engine. The trial Judge has found as a fact that the whistle was sounded and the bell rung. Without expressing agreement with this finding, it is one with which this Court

would not interfere, it being a finding on conflicting evidence by the trial Judge who heard and saw the witnesses.

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The trial Judge finds that the defendants were guilty of negligence in leaving cars standing upon the crossing. Assuming the crossing in question to be part of a public highway, I think it is clear that the defendants committed a breach of section 279 of the Railway Act in leaving cars encroaching upon the highway. The evidence shows that these cars had been there for some time before the accident. If we assume that the railway company had a right to leave a long string of cars on their own land adjoining the crossing, the plaintiff would have had a fairly good view of the main line to the right if there had been no car standing partly on the highway. By reason of the obtuse angle between the highway and the railway to the right, the plaintiff could, if the view was not obstructed, see further southerly along the main line than he could if the highway had crossed at right angles. It is obvious that each foot by which the car encroached on the highway made, by reason of the angle, a considerable difference in the distance which the plaintiff could see along the main line to the right. If the car had not been standing where it was, it is clear from the evidence and from an examination of the plans that the plaintiff might have seen the engine coming on the main line an appreciable time before he did. I think he would have had time either to stop his automobile or, at all events, to have swerved to the right so as to avoid the engine, the angle permitting the turn to be easily made. I think that the defendants, by leaving the car partly on the right-of-way, obstructed the view and caused the accident. In so leaving the car they were negligent and they also committed a breach of the statute. They should, therefore, be liable for the damages, unless they can prove that the

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plaintiff by the exercise of reasonable care could have avoided the accident.

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The learned trial Judge found that the defendant was "not paying the attention to the surroundings that, under the circumstances, he should have paid, and that this want of care contributed materially to the accident." The reasons for this finding are given by the trial Judge as follows: "What would a prudent man do under the circumstances? I am forced to the conclusion that a prudent man approaching a track where he knows that trains, yard engines and handcars are liable to pass at any moment to and fro, finding his view obstructed by standing cars, and knowing, as the plaintiff admits, that it was thus made dangerous, would, when approaching the crossing, reduce his speed to the lowest possible speed, and would exercise care both by looking and listening. The plaintiff could have reduced the speed of his car to one or two miles an hour; instead of that he goes over the crossing, as he himself says, at eight miles an hour. There is no doubt that the car going at eight miles an hour cannot be stopped within as short a distance as if it were going at a lesser rate of speed. I fail to understand why, if the plaintiff had exercised the caution which I think under the circumstances he ought to have exercised, he did not hear the bell, or see the moving top of the smoke-stack of the engine."

With great respect, I cannot, upon the evidence, come to the conclusion that the plaintiff was guilty of negligence disentitling him to recover. The evidence shows that both he and Purvis looked and listened and that neither of them saw or heard the engine approaching. The man, Maranda, who was 150 yards behind, neither heard nor saw the engine before the collision occurred. It might have been an act of prudence to have slowed up or even to have stopped the automobile while one of the party got out and looked up and down the track, but the failure to take such excessive precautions did not constitute negligence on the part of the plaintiff. The speed of eight miles an hour at which he approached the crossing

was a reasonable one. It is true that, if he had slowed up to two miles an hour, the accident might have been avoided. On the other hand, if he had rushed through at twenty miles an hour, he would have been over the crossing before the engine reached it. The plaintiff had no reason to believe that the crossing was immediately dangerous by reason of any engine or moving train being in the vicinity. He knew it was a place where caution should be observed, but I cannot find that he neglected any precaution he was bound to take. No doubt the long line of cars muffled the sound of the whistle and bell, if they were sounded. I can understand this happening on a hot July day. The same cars would, as the plaintiff neared the crossing, completely hide the smoke-stack from his view. He was sitting in an automobile and the tops of the cars would be a considerable height above him. The smoke-stack of an engine would be completely hidden behind them. The light engine seems to have been drifting homeward on a level track at about ten miles an hour. It was probably emitting little, if any, steam or smoke.

It was contended by the defendants that the portion of their right-of-way at the intersection of Marion street was not included in, or made part of, the highway.

The Railway had been constructed before the opening of Marion street at that point. On 28th September, 1908, the City of St. Boniface passed a by-law opening as a public street the production of Marion street from Rue de Meuron to Bourget Road, the portion so opened being shown and colored pink on a plan annexed to the by-law. This street led up to and beyond the point of intersection where the accident occurred. The portion of the railway right-of-way where the street would intersect the railway was not colored pink on the plan. The city corporation at that time had not obtained leave under the Railway Act to construct the street across the railway.

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In 1911 the City of St. Boniface applied, under section 237 of the Railway Act, to the Board of Railway Commissioners for Canada for authority to construct Marion street across the defendants' railway at the point in question. On 6th February, 1911, the Board made the following order:

"Upon the report of an Engineer of the Board approving of the said plan and profile, the Railway Company not offering any objection—

"It is ordered that the applicant be, and it is hereby, authorized to construct Marion street, in the City of St. Boniface, across the track of the Canadian Northern Railway Company, as shown on the plan and profile on file with the Board under the said file No. 16027, in accordance with the General Regulations of the Board affecting highway crossings, as amended May 4th, 1910."

The authority there given is to construct Marion Street across the track of the railway. This permitted the construction of the street to its full width across the track. Nothing is said in the order as to there being more than one track. The intention of the order was to permit the City of St. Boniface to construct Marion Street across the railway at that point and, if more than one track existed there at the time, the order was sufficient to include the right to cross such additional track or tracks. In accordance with this order the railway fences were torn down to the full width of Marion Street, namely sixty-six feet at right angles across the street. A plank crossing and approaches were constructed, which have since been constantly used by the public. The street has, in fact, become the usual highway for traffic between St. Boniface and Transcona. The defendants assented to this use and have treated the crossing in question as a regular railway crossing. There is no foundation for the contention that the highway must be limited at that point to the mere width of the plank crossing. The order permits the opening of the



street to its full width and that was, no doubt, the intention of the City.

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It is argued that, after the order of the Board was made, the City of St. Boniface should have passed another by-law opening up the street across the railway under section 705, sub-section (b), of the St. Boniface City Charter, 7 & 8 Ed. VII, c. 57. That section enables the City to pass by-laws for "establishing, opening, making, preserving, improving, maintaining, widening \* \* within the City any highway or road through, over, across \* \* or upon the railway and lands of any railway company" within the jurisdiction of the Council. No by-law subsequent to the order of the Board of Railway Commissioners was put in.

The intention of the by-law of 28th September, 1908, was, as the recital shows, to open and continue Marion Street from Rue de Meuron to Bourget Road. This would necessarily mean that the street was to cross the railway as a continuous line of highway as soon as the Board of Railway Commissioners gave the necessary permission. Upon receiving authority from the Board to cross the railway the intention was rendered effective. I do not think that any further by-law was necessary. On this point I would refer to the opinion of Chief Commissioner Killam in *Re Reid & Can. Atl. Ry Co.*, 4 Can. Ry. Cas. at page 275.

The defendants not only recognized the existence and validity of the crossing by treating it as a duly authorized crossing, but by their answers to the interrogatories, sworn to by their general superintendent for this Province, admitted that their railway actually crossed Marion Street at that point. The following interrogatories were delivered to the defendants under Rule 407b, 5 & 6 Ed. VII, c. 17, and the following answers received:

"1. Did the Canadian Northern Railway Company on the 10th day of July, 1912, own a line of railway

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which crossed Marion Street in the City of St. Boniface?"

The answer to Interrogatory No. 1 is "Yes."

"2. Were the Canadian Northern Railway Company, on the 10th day of July, 1912, operating a line of railway which crosses Marion Street in the City of St. Boniface?"

The answer to Interrogatory No. 2 is "Yes."

"3. How many tracks owned or operated by the said Company were lying across Marion Street in the City of St. Boniface on the 10th day of July, 1912?"

The answer to Interrogatory No. 3 is "Three."

In view of these admissions and of the user of the crossing by the public with the assent of the defendants, I think that at all events the onus was cast upon the defendants to prove, if they could, that the street was not constructed or validly established across their right-of-way.

I think the appeal should be allowed with costs, the judgment in the Court of King's Bench set aside with costs, and a verdict entered for each of the plaintiffs. Ralph S. Campbell suffered much damage. His automobile, for which he had paid \$2,200 a short time before the accident, was almost wholly destroyed. He suffered severe injury and a considerable loss of time, and he paid considerable amounts for hospital charges and medical attendance. I think the damages awarded to him should be assessed at \$2,500.

The infant plaintiff, Isabel Campbell, had her nose badly broken and was severely injured. The broken nose is likely, according to the medical evidence, to result in a permanent disfigurement, a serious thing for a girl. I think the damages to the infant plaintiff should be assessed at \$500.

CAMERON, J.A. This action is brought against the defendant Company by the plaintiff for himself and as next friend of his infant daughter, to recover damages occasioned by the collision of his motor car with a switch

engine belonging to the company, which collision was due, it is alleged, to the negligence of the Company.

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It appears that the plaintiff, who had been in the business of transporting passengers by his motor from Winnipeg to Transcona, on July 10th took his wife, two infant children and a passenger named Purvis with him, intending to go to Transcona from this City. He drove in an easterly direction along Marion Street in the City of St. Boniface, and when he approached the point where the Canadian Northern Railway tracks are crossed by the street he slackened speed. He found the street, as he approached the crossing, "blocked on the north and the south side of the street, leaving a space of about 25 ft." It was blocked, he says, with "box cars, standing on the siding, so that I hadn't any view of the main line whatever."

The plaintiff, who had repeatedly gone over this crossing in the previous two months, says: "I was watching for trains, as I always do, knowing it to be a dangerous crossing, and I could neither see smoke or steam, nor hear a whistle or a bell ringing. When I approached the crossing I did not see the locomotive and I wasn't over two feet from the foot-board on the front of the engine, and I didn't have time to stop my car in so short a distance."

There was a box car close up to the plank crossing on the right as the plaintiff approached. The end of the foot-board in front of the engine struck the front of the radiator on the front of the motor. The plaintiff and all the others, with the exception of the younger girl, were thrown out and he and the elder little girl sustained painful injuries and the motor car was practically demolished.

The plaintiff is positive that there was no bell rung or whistle blown. Purvis says the same. According to the plaintiff he had been going at the rate of 10 or 12 miles

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an hour, until approaching the crossing, when he slowed down to about eight miles an hour. The plaintiff had no speedometer and relies on his own judgment as to speed. He slackened speed by lessening the gasoline supply, and this was done about two hundred feet from the crossing. It was at a distance of three or four hundred yards that he recognized that he could not see down the line because of the cars. Purvis corroborates this evidence, and says that the plaintiff was not going over eight miles an hour, if he was going that.

Maranda, who was also engaged in the "auto-livery" business, followed the plaintiff on the occasion in question at a distance of from 150 to 200 yards. He says "we were generally watching ourselves to go across this crossing." He heard no whistle or bell and saw no smoke or steam and noted the cars standing on the track on both sides of the road, leaving an opening of about 25 feet. He says that the plaintiff was not going as fast as he was himself, and he was going at eleven miles an hour.

The evidence of the plaintiff on the point of ringing the bell and blowing the whistle was directly controverted by the defence. The learned trial Judge, as I take it, has found that the Company complied with the law in these matters, and there is evidence to sustain that view and I am not disposed to question the finding.

If the defendant's cars obstructed this highway, contrary to the provisions of the Railway Act, there is established against it a *prima facie* case of negligence. The by-law of the City of St. Boniface, put in evidence, declared that "portion of land colored pink on the plan," being a production of Marion Street across the railway, "opened as a public street." Application was then made to the Railway Board for an order which was accordingly made, authorizing the City of St. Boniface to construct Marion Street across the track. The objection is made that, as there was no subsequent by-law declaring open

that portion of the street, covering the right-of-way, where the street crossed it (not colored on the plan), such portion remained the property of the Railway Company. That is to say, sub-section (b) of section 705 of the St. Boniface charter was not complied with. In any event, if any portion of the crossing is to be considered a highway, it is argued that that portion only occupied by planking and actually used by the public can be considered such, and the remainder of the crossing area continues the absolute property of the Company, which it is at liberty to use as it may choose, unhampered by the provisions of section 279, and other provisions of the Act.

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In this case the fencing along both sides of the track had been torn down, a crossing signal post erected, and planking with gravel was put down between the tracks to a width of about 30 feet. There was ditching on the sides of the road, apparently made by the City. There is an approach on the street leading up to the rails and the planking between the rails. It is apparent that the public used this crossing and to a considerable extent. The railway company evidently, according to the evidence, treated it as a highway crossing.

Now, what has been done with reference to this crossing was done pursuant to the order of the Board, and with the acquiescence, at least, of the Company. Reading the by-law and order together and keeping in view what was subsequently done by the City under the order, it seems to me that no further by-law was necessary: *Reid v. Canada Atlantic Ry. Co.*, 4 Can. Ry. Cas. 275, per Hon. A. C. Killam, Chief Commissioner.

The term "highway" includes (sec. 2, s-s. 11) "any public road, street, lane or other public way or communication." The words "public communication" are given a wide significance in *C.P.R. v. Toronto*, [1911] A.C. 477. "The danger to the public is the same whether its

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members traverse the lines of a railway upon which trains run, as of right, or by express or implied permission." I think, therefore, to the whole width of 66 feet, there was a public communication traversing the railway tracks at this crossing. The City was authorized to construct to the whole width of the street and there was a partial construction by, or with the authority and acquiescence of, the City.

It was argued that, even if the highway should, at the crossing, be confined within the limits of the planking, there was nevertheless such a dangerous condition created by reason of the obstructions that more was required from the railway company than the statutory warnings; that is, that there was a liability imposed by common law in addition to that required by the Act. We were referred to *Jenner v. S. E. R.*, 105 L.T. 131, where the jury found that the crossing there in question was habitually used for vehicular traffic, and that the company had been guilty of negligence in not providing sufficient safeguards therefor. It was held that the Company was under an obligation to use proper precautions. There was no evidence of any failure of the Company to comply with the statutory regulations. "The railway, at any rate, had laid upon them the obligation of seeing that there was nothing in the nature of a trap," p. 133. A duty is cast on railway companies "to take reasonable precautions at dangerous points:" *Smith v. Niagara &c. Ry. Co.*, 4 Can. Ry. Cas. 222. We were also referred to *Canada Atlantic v. Henderson*, 29 S.C.R. 632, and *Wallman v. C.P.R.*, 16 M.R. 92.

On the other hand, it is pointed out that our Supreme Court has held that, under our Act, the powers given to the Board to determine the character and extent of the protection given the public, at the intersection of highways with a railway track at rail level, are exclusive, and that a failure to invoke them does not take the matter

away from that jurisdiction: *G.T.R. v. McKay*, 34 S.C.R. 81. But the decision of Mr. Justice Davies is not so sweeping as that. For he says at p. 101: "It by no means follows from the present judgment of this Court that railway companies might not be properly adjudged guilty of actionable negligence in cases arising out of shunting cars across railway crossings, apart altogether from questions relating to the speed of trains and the legality of their fencing at highway crossings." Under the circumstances in this case, it may well be doubted, therefore, whether this judgment in the Supreme Court applies. But, as I consider the highway here extends the whole 66 feet in width contemplated by the plans and the by-law and order, it is not material to make the distinction.

There remains to be considered the defence of contributory negligence on the part of the plaintiff, and I must say that this is a matter that has given me much consideration. The plaintiff knew the dangerous character of the crossing and did keep an outlook; he watched the track on both sides as he approached it; he slackened his speed; he listened, but heard, he says, no bell or whistle; he looked, but saw no escaping steam or smoke. His evidence is supported by that of Purvis and Maranda. After all, it does seem to me that the determination of this case depends on the answer to this question: Was the speed of eight miles an hour, at which the plaintiff endeavored to cross, too great in the circumstances? It would have been safer, no doubt, had he done what the learned trial Judge suggests he should have done, slackened to a speed of one or two miles an hour. Or, again, he might have stopped altogether and made a personal inspection of the main line before crossing. There is no doubt that the circumstances here were such as to call for the exercise of prudence on his part. The plaintiff knew the road, was familiar with the crossing,

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saw the obstructions to his full vision and had with him in his car his wife and children. He was an experienced driver, and he did take precautions such as he thought necessary. He apparently did everything that the most exacting dictates of prudence could have prompted, except that he did not slow down his car to a speed of one or two miles an hour or stop altogether to make a survey of the main line track. Some drivers (but certainly not many of them) might adopt one of these two last alternatives. Others might not, and I dare say many would not slacken their speed to the extent the plaintiff did, if they slackened at all. But we cannot hold the plaintiff to a standard of caution beyond that required of the ordinary man in his position.

The defence of contributory negligence, if established, bars the plaintiff's right to recover, because it is his negligence, and not that of the defendant, that is the proximate or "decisive" cause of the loss or damage. The onus of proving that defence is on the defendant, by whom it must be affirmatively established. As I have said, the whole question here comes down to this narrow point, viz.: Does the fact that the plaintiff approached this crossing at the speed he did constitute such want of care and caution on his part as disentitles him to relief? After reflection, I am not prepared to hold that it does. It appears to me that the plaintiff, while not acting with the greatest degree of caution (as is indeed easy to say after the event), did nevertheless exercise such ordinary care as might be expected of the driver of a motor car in the circumstances confronting him in this case. It is my opinion, therefore, that the defendant Company has failed in affirmatively establishing the defence of contributory negligence.

I think the judgment entered for the defendant must be set aside and a verdict entered for the plaintiffs for the amounts stated in the judgment of Mr. Justice Perdue, with costs of appeal and of the Court below.



HAGGART, J.A. The trial Judge has come to the conclusion that the adult plaintiff, Ralph Stewart Campbell, was negligent, and that his negligence contributed to the accident, and, as it is the duty of the trial Judge to find the facts and draw the inferences, I would hesitate before disturbing that finding. Where the story of the plaintiff and his witnesses differs from that of the employees of the Company, he accepts the version of the latter. He has done so after seeing and hearing the witnesses, and I would do so after reading the evidence. It is proved to his satisfaction that the bell was rung and that the whistle was blown, as required by statute, and that the engine was not running at an excessive speed. I would dismiss the appeal of Ralph Stewart Campbell.

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I think that Marion Street, where it crosses the line of railway, is a highway 66 feet wide and that, notwithstanding any irregularities in the passing of the by-law or in the making of the order of the Board of Railway Commissioners, it is a highway within the legal definition of that term, and also as defined by the interpretation clause of the Railway Act.

I cannot say that the allowing a part of the car to remain on the street was the act or thing done which was the cause of the injury, so as to make the Company liable under section 427 of the Railway Act. It was the long line of cars extending along the siding eastward that prevented the plaintiff from seeing the approaching engine, as he approached the crossing.

But the adult plaintiff's negligence does not dispose of the claim of the infant plaintiff, and there arises the very important question, which is whether the negligence of the father is a defence to the claim of the infant plaintiff Isabel, two years of age, who was severely injured in the accident.

*Waite v. N. E. R., E. B. & E.* 719, was a case in which the unanimous opinion of three Judges of the Court of

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Queen's Bench was affirmed by the seven Judges of the Exchequer Chamber. The grandmother had charge of a child too young to take care of itself, and took two tickets at a railway station for the purpose of being conveyed on the railway. While she and the child were on the railway and crossing the tracks to take their train, a train on another track struck them, killing the grandmother and injuring the child, and the evidence showed, and the jury found, that both the Company and the grandmother were guilty of negligence. The Court of Exchequer Chamber affirmed the judgment of the Court of Queen's Bench which held that the child could not maintain an action against the Company. Chief Justice Cockburn, in his reasons, on page 732, says that "the Company must be taken to have received the child as under her control and subject to her management. The plea and the finding show that the negligence of the defendants contributed partially to the damage; but that the negligence of the person in whose charge the child was, and with reference to whom the contract of conveyance was made, also contributed partially. There is not, therefore, that negligence which is necessary to support the action."

Pollock, C.B., on page 733, says: "There is really no difference between the case of a person of tender years under the care of another and a valuable chattel committed to the care of an individual, and the action cannot be maintained unless it be maintained by the person having the apparent possession."

And Williams, J., on the same page:

"There was here, as it seems to me, from the particular circumstances, an identification of the plaintiff with the grandmother \* \* The person who has charge of the child is identified with the child. If a father drives a carriage in which his infant child is in such a way that he incurs an accident which by the exercise of reasonable care he might have avoided, it would be strange to say that, though he himself could not maintain an action, the child could."

Crowder, J.: "There is an identification such that the

negligence of the grandmother deprives the child of the right of action."

Such was the doctrine as to the rights of children of tender years in cases of concurring negligence.

According to this authority the negligence of the person in charge is an answer to an action against the other wrong-doer.

Along the same lines is another authority: *Armstrong v. Lancashire &c. Ry.*, L.R. 10 Ex. 47. The plaintiff was an inspector in the employ of the London & N.W. Ry. which had running powers over a part of the defendant's line. He was travelling on this portion of the road. There was a collision. There was evidence of negligence on the part of the driver of the plaintiff's train, and the jury found joint negligence, and it was held that the plaintiff was so far identified with the L. & N.W.Ry. that he could not recover.

The plaintiffs contend that the above is not a proper statement of the law, and that this doctrine of "identification" is obsolete, and that, if there is no relationship such as master and servant, or principal and agent, between the plaintiff and the third persons whose negligence contributed with that of the defendant to the injury or accident, then the contributory negligence of this third party is not a defence and the infant plaintiff relies upon the following authorities.

*Mills v. Armstrong*, 13 A.C. 1. A collision occurred between the steamships *Bushire* and *Bernina* through the fault or negligence of the masters and crew of both. Two persons on board the *Bushire*, one of the crew and a passenger, neither of whom had anything to do with the negligent navigation, were drowned. The representatives of the deceased brought actions *in personam* against the owners of the *Bernina* for negligence under Lord Campbell's Act, and it was held, affirming a decree of the Court of Appeal, that the deceased persons were not

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identified in respect of the negligence with those navigating the Bushire, that their representatives could maintain the actions and could recover the whole of the damages under Lord Campbell's Act, and, on page 16, Lord Watson discusses the question in these words:

"When the combined negligence of two or more individuals, who are not acting in concert, results in personal injury to one of them, he cannot recover compensation from the others, for the obvious reason that, but for his own neglect, he would have sustained no harm. Upon the same principle, individuals who are injured without being personally negligent are nevertheless disabled from recovering damages if at the time they stood in such relation to any one of the actual wrong-doers as to imply their responsibility for his act or default \* \* . If they are within the incidence of the maxim *qui facit per alium facit per se*, there can be no reason why it should apply in questions between them and the outside public, and not in questions between them and their fellow wrong-doers," and, after discussing *Thorogood v. Bryan*, 8 C.B. 115, which, with the foregoing case of *Armstrong v. Lancashire &c. Ry.*, were being overruled, he proceeds on p. 18:

"It humbly appears to me that the identification upon which the decision in *Thorogood v. Bryan* is based has no foundation in fact." \* \* "In my opinion an ordinary passenger by an omnibus or by a ship is not affected, either in a question with contributory wrong-doers or with innocent third parties, by the negligence in the one case of the driver and in the other of the master and crew by whom the ship is navigated, unless he actually assumes control over their actions and thereby occasions mischief."

The facts here are not unlike those in *Eisenhaur v. Halifax &c. Ry. Co.*, 12 Can. Ry. Cas. 168. That is a judgment of the Supreme Court of Nova Scotia, and that Court did not recognize the doctrine of identification relied on in *Waite v. N. E. R.* A waggon driven by the father containing his wife and step-son, while attempting to pass a dangerous crossing on the defendant's rail-

way on Sunday on their way to church, was struck by an engine sent out to perform some special work, resulting in the father and his wife being killed and the son seriously injured. There was negligence on the part of the Company's servants in failing to give proper signals in approaching the crossing and in running the engine at an excessive speed, which would have rendered the Company liable; but the trial Judge found contributory negligence on the part of the father, precluding those claiming under him from recovering, and this finding was sustained by the Court. It was held that the negligence was not a bar to the wife or those claiming under her, or to the step-son, precluding them from recovering for personal injuries, in the absence of evidence of contributory negligence on their part. The trial Judge, whose reasons were affirmed, on page 183, says: "It was Mr. Ernst's (deceased) team; he had absolute control over it; neither his wife nor his step-son had any right to interfere with the management of it, and no duty was cast upon either to do so. Most men would not tolerate any interference with his mode of driving \* \* Arthur (the step-son) was a mere passenger. He could not refuse to go to church, nor to take whatever place was assigned to him in the wagon. Moreover, I do not think he was old enough and sufficiently advanced to appreciate the danger of the situation. The doctrine of contributory negligence does not therefore apply to him."

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*Matthews v. London St. Tram. Co.*, 58 L.J.Q.B. 12, was an action by a passenger on an omnibus against the owners of a tram car for compensation for injuries sustained in a collision. It was held that the direction to the jury, since the decision of the House of Lords in *Mills v. Armstrong*, should be: "Was there negligence on the part of the tram car driver which caused the accident? If so, it is no answer to say that there was negligence on the part of the omnibus driver, the plaintiff in such a case not being disentitled to recover by reason of the negli-

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HAGGART, J.A. Pollock, B., at page 13, refers to the change in the law, saying that "in 1888 it was laid down by the House of Lords in *Mills v. Armstrong*, '*The Bernina*,' that the old law on the subject could not be sustained."

In *Sangster v. Eaton*, 25 O.R. 78, 21 A.R. 624, 24 S.C.R. 708, the facts were: The mother went with her child to the defendant's store to buy some clothing for both. While there a mirror fixed to the wall fell and injured the child. The trial Judge non-suited the plaintiff, and the Divisional Court sent the case back for a new trial (which judgment was affirmed by the Court of Appeal and Supreme Court), and I find Armour, C.J., in the Divisional Court, towards the close of his judgment, saying:

"The doctrine of contributory negligence is said not to be applicable to a child of tender years: *Gardner v. Grace*, 1 F. & F. 359. It may be prudent in the present case to avoid further difficulty to submit the question to the jury whether the mother was taking reasonably proper care of the child at the time the accident occurred, although in my view the negligence of the mother in this respect would not under the circumstances of this case prevent the recovery by the child," citing *Mills v. Armstrong*; *Martin v. Ward*, 14 Ch. Sess. Cas. 4 Series, 816; *Cosgrove v. Ogden*, 10 Am. Rep. 361; *Pollock on Torts*, 3rd ed. 418.

In *Shearman and Redfield*, in sec. 66, 5th ed., the author says, in discussing the doctrine of identification, "that it has been exploded in every Court beginning with New York and ending with Pennsylvania," and "that it was finally overruled in England by *Mills v. Armstrong*;" and, on the subject of negligence of parents, in sec. 71 I find the following: "The distinction between the two classes of cases is, however, well illustrated in two Ohio decisions. A child brought an action on his own injuries, and the Court held that his father's contributory negli-

gence was no defence. The father brought another action upon the same injury to recover for the loss of services, and the same Court held his contributory negligence to be a complete defence."

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The infant is not a valuable chattel to which he is compared by one of the learned Judges sitting in *Waite v. N.E.R.* He has the ordinary rights of citizenship to protection from wrong-doers. Is it justice to make his personal rights dependant upon the good or bad conduct of others? If only one party offends, the infant has his action. If two offend, their faults neutralize each other and he has no remedy. Such would be the result.

I think the infant plaintiff is entitled to recover. The injury is a serious one. It may be a permanent disfigurement and a good-looking face is an important asset to a girl. It is not an easy matter to assess such damages. I would fix them at \$600.

I would allow the appeal of the infant and enter a verdict for her for the above sum.

HOWELL, C.J.M., and RICHARDS, J.A., concurred with Perdue, J.A., and Cameron, J.A.

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## COURT OF APPEAL.

## ROBINSON V. GRAND TRUNK PACIFIC RY. CO.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, JJ.A.

*Jury trial—King's Bench Act, R.S.M. 1902, c. 40, s. 59 (b)—Action for conspiring to cause wrongful dismissal and to slander plaintiff.*

The statement of claim alleged a conspiracy on the part of the defendants to cause the plaintiff to be unlawfully dismissed from his employment with the defendant company and a conspiracy to wrongfully and maliciously lay a charge of theft against the plaintiff before the company, also for wrongful dismissal of the plaintiff by the defendant company.

*Held*, following *Griffiths v. Winnipeg Electric Ry. Co.*, (1907) 16 M.R. 512, that the Referee had rightly exercised the discretion conferred upon him by sub-section (b) of section 59 of the King's Bench Act in ordering a trial of the action by a jury, as one at least of the causes of action was akin to, or within the general principles of, two of those referred to in that section, viz.: slander and malicious prosecution.

DECIDED: 14th May, 1913.

**Statement.** APPEAL from an order of Curran, J., dismissing an appeal from an order of the Referee directing the trial of the action by a jury.

The following judgment was delivered by

CURRAN, J. This matter comes before me as a Judge sitting in Chambers by way of appeal from an order of the Referee directing the trial of this action by a jury.

The statement of claim contains two separate causes of action, one for conspiracy to cause the plaintiff to be unlawfully dismissed from his employment with the defendant company and for conspiring to wrongfully and maliciously lay a charge of theft against the plaintiff with the defendant company, or in other words a conspiracy to defame the plaintiff by accusing him of an indictable offence. The other cause of action is for wrongful dismissal of the plaintiff by the defendant company. Actions for malicious prosecution and slander are, *inter alia*, by sec. 59 of the King's Bench Act required to be tried by



a jury unless the parties in person or by their solicitors or counsel expressly waive such trial.

And, subject to the provisions of this section, all other causes, actions, matters and issues shall be tried by a judge without a jury unless otherwise ordered by a judge.

The Referee in making the order appealed from exercised, and, I think, rightly so, a discretion which undoubtedly was given him by the statute referred to, and on that ground I ought not to interfere. Furthermore, I think the order was rightly made upon the principles laid down by the Court of Appeal in *Griffiths v. Winnipeg Elec. Ry. Co.*, 16 M.R. 512, because one at least of the plaintiff's causes of action is akin to or within the general principles of two of those referred to in section 59, viz., slander and malicious prosecution. I so interpret the language of the learned Chief Justice at page 516: "If the case was one akin to or within the general principles of those referred to in section 59, it seems to me, he (the Judge) would conclude that the policy of the law was that such a case should be tried by a jury;" and of Perdue, J.A., at page 526: "This case is similar in nature to at least one class of actions which by section 59 shall be tried by a jury." I, therefore, dismiss the appeal with costs to the plaintiff in the cause in any event.

Defendants appealed.

A. Hutcheon for defendants.

B. L. Deacon for plaintiff.

THE COURT dismissed the appeal.

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## COURT OF APPEAL.

## GREENLAW V. CANADIAN NORTHERN RY. CO.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, JJ.A.

*Railways—Railway Act, R.S.C. 1906, c. 37, s. 294 (4)—Fences—Animals killed on track—Cattle at large—By-law of Municipality allowing it—Negligence or wilful act or omission of owner—Construction of statutes.*

1. As there is no definition of the word "negligence" or "wilful" in the Railway Act, R.S.C. 1906, c. 37, or in the Dominion Interpretation Act, these words in sub-section (4) of section 294 of the Railway Act should be construed according to the law of the Province in which their meaning has to be ascertained.
  2. Where the by-laws of the Municipality in which the owner keeps his cattle, passed in accordance with the Municipal Act, permit the running at large of the cattle at all times, it is neither negligence nor a wilful act or omission on the part of the owner, within the meaning of sub-section (4) of section 294 of the Railway Act, for him to allow them to run at large; and, where the cattle, being thus at large, get upon the line of railway through a defective fence and are killed by a train of the railway company at a place which is not the intersection of the right of way with a highway, the company is liable to the owner under that sub-section in damages for his loss.
- Per PERDUE, J.A. The expression "wilful act or omission" means doing something which a reasonable man would not do, or failing to do something which a reasonable man would do, and could not be applied to the action of the plaintiff in doing what was authorized and encouraged by the law in force in the Municipality.

DECIDED: 9th June, 1913.

Statement. COUNTY Court appeal.

The plaintiff brought this action to recover damages for the loss of cattle killed on the defendants' railway.

At the trial before Judge Mickle a verdict was entered for plaintiff.

Defendants appealed.

O. II. *Clark, K.C.*, for defendants, appellants, cited *Clayton v. C.N.R.*, 17 M.R. 426, 7 Can Ry. Cas. 355; *Renaud v. C.P.R.*, 13 Can. Ry. Cas. 358; *Parks v. C.N.R.*, 21 M.R. 103; *Becker v. C.P.R.*, 7 Can. Ry. Cas. 29, and *Fensom v. C.P.R.*, 4 Can. Ry. Cas. 76.

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*C. L. St. John* for plaintiff, respondent, cited *Quinn v. C.P.R.*, 8 Can. Ry. Cas. 143.

RICHARDS, J.A. In the municipality in which the plaintiff resides, and in which is that part of the defendants' line of rail in question, there is a by-law (pursuant to section 643 (b) of The Municipal Act) allowing cattle to run at large in the municipality.

The plaintiff had, for nine years, been in the habit of driving his cattle, at the proper season of the year, to pasture on section 9, which is unfenced, and leaving them there. The cattle strayed from section 9 up to section 15, crossing, necessarily, road allowances, none of which, however, had been opened up, and, owing to what is admitted by the defendants to have been an imperfect fence along the defendants' right of way, got on that right of way and were killed by one of the defendants' trains at a place which was not the intersection of the right of way with a highway.

It appears that the part of section 15, from which they got on to the right of way, was unfenced, and its owner had, for years, tacitly acquiesced in other people's cattle (including the plaintiff's) grazing on it.

The plaintiff sued the defendants in the County Court of Minnedosa, and the learned trial Judge gave judgment in his favor for \$150, the value of the cattle killed.

The defendants, in appealing, admit that the fence in question was defective, but claim that the cattle got at large through the negligence, or wilful act, or omission, of the plaintiff, as contemplated by sub-section (4) of section 294 of The Railway Act.

Though I think he has done so, I do not think it was necessary for the plaintiff to show that his cattle were rightfully upon section 15. Sub-section (4), above referred to, provides that, where cattle, whether upon the highway or not, get upon the property of the Company and by

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reason thereof damage is caused to or by such animal, the party suffering such damage, except in the cases provided for in section 295, shall be entitled to recover the amount of such damage against the Company; unless the Company establishes that such animals got at large through the negligence or wilful act or omission of the owner or his agent, or the custodian of such animal or his agent.

The case does not come in any way within section 295, and the killing was not at the intersection of the right of way with a highway, so that all that remains is to consider whether the cattle got at large through the negligence or wilful act or omission of the owner.

Section 643 of the Municipal Act, sub-section (b), permits the passing of by-laws by a municipality for *allowing*, restraining and regulating the running at large or trespassing of any animals.

The by-law in question says that, subject to the restrictions as to breachy animals and entire animals imposed by any statute of Manitoba, or by any by-law of the municipality, cattle may run at large at all times.

There is no suggestion that these cattle come within the exception as to breachy, or entire, animals.

But it is contended that, notwithstanding the provisions of the Municipal Act and of the by-law, the liability is just the same as in a case where there was no such by-law, as that liability is fixed by Dominion statute.

There is no provision in the Railway Act, or in the Dominion Interpretation Act, defining what is meant by the words, "negligence," or "wilful." We are, therefore, obliged to look for definitions to the Common Law in force at the place where the damage arose, and, as that is within the powers of the Provinces as to property and civil rights, it is surely controlled by the statutes of those Provinces.

I think the intention of the Dominion Legislature was

to leave the expression "negligence or wilful act or omission" to be interpreted by the Provincial law in force where the killing occurred, and it would follow that, where they were so lawfully at large under the Provincial law, the mere letting them at large should not, in itself, be a defence.

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If that were not so, the privilege of allowing cattle to be at large under such a by-law as the one in question would be of little value in a municipality through which a railway ran, and the railway would in such case incur an at least greatly lessened liability for not keeping its fences in repair.

I take the result to be that, irrespective of whether the cattle were, as between their owner and the owner of the land from which they got on to the track, lawfully upon that land, yet, where they were lawfully at large under the Provincial law, the railway is, by sub-section (4), liable, if they are killed on the railway's property by that railway's train, in cases that do not come under section 295, and where the killing is not at the intersection of a highway with the railway.

I would dismiss the appeal with costs.

PERDUE, J.A. The cattle in respect of which this action is brought got upon the defendant's right of way, not at a highway crossing, but at some distance therefrom. It is admitted that they got upon the Company's property by reason of a defect in the Company's fence, a defect of which the Company had notice, and which it neglected to repair. The cattle were killed by a train belonging to the defendant. The defendant is therefore liable for the loss of the cattle under sub-section 4 of section 294 of the Railway Act, unless it can establish that they "got at large through the negligence or wilful act or omission of the owner."

The plaintiff had turned the cattle out to graze on vacant land some distance away from the railway. A by-

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law of the municipality where the plaintiff resided and where the injury occurred, passed in pursuance of section 644 of the Municipal Act, permitted cattle to run at large. The by-law, duly passed, as we must assume it was, under the authority of the Act had the same effect as a statute within the boundaries of the municipality.

The plaintiff contends that he was not negligent in doing what the law permitted him to do. The word "negligence," as used in the above section, must be interpreted in accordance with the laws of this Province, there being no special meaning put upon it by the Railway Act. To do something permitted and authorized by law, something ordinarily done in the municipality by reasonable and prudent men, can surely not be held to be an act of negligence. The other words in sub-section 4, "wilful act or omission," give more difficulty. The word "omission" means the failure to do something which it is one's duty to do, or which a reasonable man would do. The word "wilful" used in the expression "wilful default" has been defined as meaning that the person acting is a free agent and that what had been done arises from the spontaneous action of his will: per Bowen, L.J., in *Re Young v. Harston*, 31 Ch.D. 168, 174-175. But to ascertain the meaning of the expression "wilful act," as used in section 294 of the Railway Act, it is necessary to consider the context and the purpose of the enactment.

The intention of sub-section 4 of section 294 is to make the railway company liable where cattle get upon the property of the company and are injured by a train, unless the company can show that it is excused because the owner let his cattle get at large by his negligence or by some act or default akin to negligence. I think the whole expression, "wilful act or omission," means doing something which a reasonable man would not do, or failing to do something which a reasonable man would do. The plaintiff's action in turning his cattle out to graze a mile

or two away from where they got upon the railway was legalized and encouraged by the law in force in the municipality. He acted reasonably in taking the benefit conferred by the by-law. If the meaning I have placed on the words used in sub-section 4 is correct, the cattle were not at large through the plaintiff's negligence or wilful act or omission.

I think the appeal should be dismissed with costs.

HOWELL, C.J.M., CAMERON and HAGGART, J.J.A., concurred.

*Appeal dismissed.*

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# COURT OF APPEAL.

## BOX V. BIRD'S HILL SAND CO.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*Company—By-law providing for lien on shares for debt to company—Transfer of shares—Purchaser without notice—Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, ss. 31, 44, 59—Assignments Act, R.S.M. 1902, c. 8, ss. 29, 31—Valuation of security by creditor filing claim with assignee—Estoppel—Abandonment.*

1. A company incorporated under the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, may, under sections 31 and 44, validly enact by-laws providing that the company shall have a lien upon his shares for all debts due or owing to it by any shareholder, whether or not the debt is presently due and payable, and for prohibiting the registration of a transfer of such shares except subject to such lien.

*Child v. Hudson's Bay Co.*, (1723) 2 P. Wms. 207; *Societe Canadienne Francaise v. Daveluy*, (1892) 20 S.C.R. 449, and *Lindley on Company Law*, vol. I., 637, followed.

2. A purchaser of such shares without notice of such by-laws or of any lien upon them, if he has in good faith paid the purchase money and procured a transfer from the shareholder, would probably not be bound by the by-laws and might perhaps insist on the transfer being recorded in the books of the company and the issue to him of a certificate free from any lien: *Masten on Company Law*, 161, and *McEdwards v. Ogilvie*, (1886) 4 M.R. 6.

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3. But, if the purchaser acquires knowledge of the by-laws and the lien claimed before the execution of the transfer and while he has still in his hands part of the purchase money to an amount exceeding the debt for which the lien is claimed, he cannot then insist upon the registration of the transfer to him free from such lien.
4. To entitle a purchaser of shares, as of other property, for value without notice, to priority over a prior equitable right, he must have acquired the legal title to the shares or, at all events, an absolute and unconditional right to be registered in respect of them without notice of the equitable title affecting the shares: *Lindley*, pp. 658, 659, and such an absolute and unconditional legal right cannot, under section 59 of the Act, be acquired by a purchaser of such shares until after the execution of the transfer to him and the actual surrender of the share certificate, when the latter states on its face that the shares are transferable only on the books of the Company upon the surrender of the certificate.

The shares in question were purchased by the plaintiff from the assignee for the benefit of the creditors of one Dunn who was indebted to the Company, and the Company filed its claim for the debt with the assignee without referring to or valuing the security held by it, viz. the lien on Dunn's shares, voted on the claim at meetings of Dunn's creditors, accepted a dividend on the claim as proved and, by its representative on the board of inspectors of the insolvent's estate, voted for the sale of the shares to the plaintiff.

*Held*, that, although section 29 of the Assignments Act provides that a creditor holding security shall put a valuation upon it; there is no provision in the Act for a forfeiture of either the security or the claim in case the creditor omits to state his security, and such omission, having been made by oversight only, could not be treated as an abandonment by the company of the security it held, or as estopping it from asserting the lien on the shares, in such a case as the present where it was still feasible to have the security valued under section 31 of the Act and the insolvent's estate administered without injustice to any one.

DECIDED: 23rd June, 1913.

Statement. APPLICATION for a *mandamus*.

Samuel C. Dunn, who was the holder of 25 fully paid up shares in the capital stock of the defendant Company, on the 7th day of July, 1911, made a general assignment for the benefit of his creditors to Montague Aldous & Laing. At the time of the assignment Dunn was indebted to the defendant Company in the sum of \$907.51. By the by-laws of the defendant Company it was entitled to a charge on Dunn's shares as security for this indebtedness.



On the 22nd July the defendants sent to the assignees a statutory declaration proving their claim against the estate at the full amount, but making no reference to their security. 1913  
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The first meeting of creditors was held on the 24th July, and at that meeting an approximate statement of assets and liabilities was submitted, in which statement was included, under the heading of "Investments," this 25 shares at its face value of \$2,500. At this meeting inspectors were appointed, Mr. F. J. Sharpe, one of the defendants' solicitors, being one.

Using this approximate statement as a basis, Strevel and Box, on the 31st July, made an offer to the inspectors to purchase certain groups of assets, including those under the head of "Investments," at sixty cents on the dollar, payable one-quarter cash and the balance in three equal instalments in four, eight and twelve months, subject to verification as to quantities and a clear title to be given. The inspectors, on the same date, accepted the offer by resolution. Afterwards Strevel withdrew and Montague Aldous & Laing offered to take his place. This offer was accepted by the assignees for creditors on the 28th August. On the 18th September the plaintiffs notified the defendants that they had obtained a transfer of the shares and, on the 27th December following, they executed a transfer of the certificate to G. S. Laing and H. J. Box, the plaintiffs, the former apparently representing Montague Aldous & Laing. On the same day it was forwarded to the defendants for the purpose of being transferred on their books.. The defendants refused to make the transfer on their books, except subject to a lien or charge for the amount of their claim against it. Subsequently the assignees paid a dividend of ten per cent., and the defendants were paid, and received, this dividend upon the whole amount of their claim.

The plaintiffs brought this action for a *mandamus* to

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Statement. to them on the Company's books.

The following judgment at the trial was delivered by  
MATHERS, C.J.K.B. At the trial the plaintiffs based  
their case on two grounds, neither of which is distinctly  
raised by the pleadings, but both of which are covered by  
the evidence, and, if necessary, an amendment ought to be  
allowed. They first say that, by proving their claim for  
the full amount without placing a value on their security;  
by voting at meetings in respect of the claim so proved,  
and by accepting a dividend in respect thereof, the de-  
fendants have irrevocably elected to rank on the estate  
and to give up their security. Secondly, they say that  
the defendants, by consenting to the sale of the shares in  
question to the plaintiffs, without making any claim in  
respect of their security, are now estopped from making  
such a claim as against them. The defendants answer by  
saying that the plaintiffs, at the time they purchased, had  
full notice of the defendants' lien.

If, as the plaintiffs contend, the defendants have, by  
proving their claim without valuing their security, elected  
to go against the general assets alone, the shares are of  
course freed from their lien, and the plaintiffs are now  
the absolute owners.

In support of this proposition the plaintiffs refer to  
*Ex parte Ashworth*, L.R. 18 Eq. 705; *Rainbow v. Juggins*, 5 Q.B.D. 138; *Re Rowe's Trustee*, [1905] 1 Ch.  
597, which undoubtedly show that such is the rule in  
bankruptcy. But the rule was for a long time peculiar to  
bankruptcy, and was only enforced in the bankruptcy  
courts. It was not founded on any statute, but was es-  
tablished irrespective of express statutory enactment  
under the bankruptcy statute, 13 Eliz., c. 7. It never was  
recognized by the Court of Chancery, which continued to  
administer estates without reference to it long after it  
had become a well established rule in bankruptcy. In *Re*

*Barned's Banking Co.*, L.R. 3 Ch. 769, an attempt was made to have the bankruptcy rule applied to the winding up of a company, but the Court of Appeal refused to so apply it. The English Bankruptcy Acts, of 1869 and 1883, recognized the doctrine and incorporated it in the rules applicable to these Acts, and similar rules were also made under the Winding Up statutes. So that, now, if a creditor in either a bankruptcy or a winding up proceeding holds security and does not value it as required, he, by the express language of the rules, is deemed to have surrendered it, unless his failure to value was due to inadvertence.

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In the absence of this express penalty, a secured creditor under the Winding Up Act would not be held to have elected to abandon his security by proving his full debt without valuing it. The law was so laid down by North, J., in *Re Henry Lister & Co., Ltd.*, [1892] 2 Ch. 420.

At the time this Province was created, the doctrine of the bankruptcy courts and the doctrines of equity had not been harmonized. There were thus two rules in the administration of estates which ran concurrently in England; the rule in bankruptcy, and the rule in chancery. The bankruptcy rules were never adopted as part of the law of this Province, except in so far as they have been introduced by The Assignments Act; but the rules of chancery were incorporated in our law.

By section 29 of the Assignments Act part of the bankruptcy rule has been adopted, to the extent of requiring the holder of security to put a value upon it, and entitling him to vote only in respect of the excess. But nothing is said as to the consequence which will follow a failure to comply with this provision. The bankruptcy rules of 1883 provide that a secured creditor who votes in respect of his whole debt shall be deemed to have surrendered his security (Schedule 1, R. 10). That part of

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the bankruptcy rule has been omitted from our Assignments Act; but, in lieu thereof, section 31 of the Act provides machinery for requiring the creditor to value his security or, in default, barring him from ranking as a creditor of the estate.

The argument is that by failure to value his security the creditor *ipso facto* forfeits it. Such a conclusion is, however, entirely inconsistent with section 31. If a secured creditor had forfeited his security because of his failure to value it under section 29, section 31 would be an absurdity, as it enables the assignee to force a valuation of the security under penalty of not being allowed to rank on the estate. By the combined effect of both sections, if the plaintiffs' contention were sound, the secured creditor who failed to value his security would not only forfeit it, but might also be barred from ranking for his debt.

In my opinion the bankruptcy rule is not in force in Manitoba, and the defendants cannot be held to have elected to abandon their security by their failure to value it.

The other ground on which the plaintiffs rely is that defendants consented to the sale of the shares in question to them without saying anything about their security, and are now estopped from making any claim in respect of it. The defendants, on the other hand, assert that the plaintiffs bought with full knowledge of their security.

Now, there is no doubt that the defendants' representative not only stood by and permitted the plaintiffs to enter into a contract for the purchase of these shares without asserting, on the defendants' behalf, any claim thereon, but he went further, and actually voted for the sale of the shares to the plaintiff. All this, however, does not deprive the defendants of the right to insist upon the lien which they undoubtedly possess, unless to do so as against the plaintiffs would be inequitable. If the plain-

tiffs knew of the defendants' lien when they bargained for the purchase of these shares, or if they acquired the knowledge at any time before they had paid over their purchase money, and while they were still in a position to protect themselves against the defendants' claim by applying, as they had the right to do, part of the purchase money in discharge of it, the defendants have not lost their right as against them.

I cannot find that the plaintiffs had notice of the defendants' lien prior to the acceptance of their offer to purchase on the 28th August. It appears that, at the first meeting of creditors, held on the 24th July, some question arose as to these 25 shares. The certificate at that time was held by Duncan McDonald, who claimed to hold it as security, but his right was disputed. During this discussion Mr. Sharpe stated that the Company had a lien on these shares for the amount of their claim. This statement does not appear to have been regarded as part of the proceedings of the meeting, because no reference is made to it in the minutes. Mr. Laing was present at the meeting as representing the assignees, but Mr. Sharpe's statement was not addressed to him, and was apparently not overheard by him. From what occurred at this meeting I cannot hold the plaintiffs affected with notice of the defendants' claim of lien. No further mention of the defendants' security took place at any of the subsequent meetings of either the inspectors or creditors until the 10th November.

The first reference in the minutes to the defendants' claim to hold security is contained in the minutes of the meeting of the inspectors held on that date. It appears that at that time Mr. Laing knew about the existence of this claim. When this knowledge came to him is not clear. He was cross-examined by the defendants upon the point, and he states that he acquired the knowledge some time between the meeting of the 10th of November

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and the meeting of the 28th of August, at which plaintiffs became purchasers; but he could not fix the time more definitely. He certainly had notice on the 10th November.

• By a statement submitted at that meeting, bearing date the 31st October, it appears that the plaintiffs had paid \$40,527.46, and the same statement shows an amount still to be paid by them amounting to \$30,059.74. They had thus in their hands ample funds out of which to discharge the defendants' lien. The assignees had guaranteed them a clear title, so that they had a right to apply the unpaid purchase money in removing any incumbrance upon the property bought.

Under the circumstances the defendants are not estopped from asserting their lien as against the plaintiffs.

The plaintiffs' case will be dismissed, but, in view of the defendants' conduct, I will award them no costs.

Plaintiffs appealed.

*H. J. Symington* for plaintiffs, appellants, cited *Montgomery v. Mitchell*, 18 M.R. 37; *Re Good and Shantz*, 23 O.L.R. 544; *McMurrich v. Bond Head*, 9 U.C.R. 333; *Re McKain and Canadian Birkbeck*, 7 O.L.R. 241; *In re Imperial Starch Company*, 10 O.L.R. 22, 25; *In re Panton*, 9 O.L.R. 3; *Moore v. McLaren*, 11 U.C.C.P. 534; *McEdwards v. Ogilvie*, 4 M.R. 1; *Greenwood v. Taylor*, 1 Russ. & M. 185; *Lodge v. Prichard*, 1 De G. J. & S. 609, 614; *Moor v. Anglo-Italian Bank*, 10 Ch. D. 681, 690; *In re Henry Lister*, [1892] 2 Ch. 420; *In re Bahia and San Francisco Ry. Co.*, L.R. 3 Q.B. 584, and *Pickard v. Sears*, 6 A. & E. 469.

*R. M. Dennistoun, K.C.*, for defendants, respondents, cited *Montgomery v. Mitchell*, 18 M.R. 45; *Re McKain and Canadian Birkbeck Co.*, 7 O.L.R. 241; *Re Henry Lister*, [1892] 2 Ch. 420, and *Ex parte Clarke*, 67 L.T.R. 233.

HOWELL, C.J.M. The by-law under which the Company claims is two-fold: 1st, a lien is declared upon the stock of a shareholder who is a debtor of the Company; 2nd, registration of a transfer is permitted, but the transferee must take it subject to the lien.

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By section 31 of the Joint Stock Companies Act, directors are given power to pass by-laws for various purposes, and, amongst others, for "the transfer of stock." Section 44 is as follows:

"The stock of the company shall be deemed personal estate, and shall be transferable in such manner only, and subject to all such conditions and restrictions, as herein, or in the letters patent, or in the by-laws of the company, are contained."

It will be observed that the widest possible words of restriction are used in this section, wider if possible than the corresponding section in Ontario.

It seems to me that the Legislature meant something by this very wide and inclusive language. A by-law of the Company declaring that a shareholder who is a debtor to his company shall only transfer his shares subject to that debt is, I think, one of the reasonable "conditions and restrictions" contemplated by, or within the meaning of, that section.

In *Re Panton*, 9 O.L.R. 3, there was no by-law, and in *Re Imperial Starch Co.*, 10 O.L.R. 22, the by-law permitted the directors arbitrarily to refuse registration. *Re McKain*, 7 O.L.R. 241, does not assist, because perhaps the by-law creating the lien was passed while the Company was a Building Society under the Ontario Building Societies Act. The special Act, in addition to incorporating the Dominion Companies Clauses Act, also provides that any by-laws theretofore lawfully passed while a Building Society are continued.

*Re Good & Schantz*, 23 O.L.R. 544, was also a case where the by-law gave the directors power to accept or

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refuse a transfer of shares just as they chose, and yet in a Court of five Judges two thought a clause similar to sec. 44 would permit the passage of such a drastic by-law as the one sought to be supported in that case.

In the case of *Montgomery v. Mitchell*, 18 M.R. 37, the present Chief Justice of the King's Bench held that a by-law in terms similar to the one in this case was good.

*Lindley on Companies*, at page 637, states the law as follows:

"It need scarcely be observed that, if it is expressly enacted or agreed by the members of a company that the company shall have a lien on their shares for all moneys which may be due from them to the company on any account whatever, a lien will be created in cases where it would not otherwise have existed."

This broad statement might of course have been induced by the fact that power to make such regulations is contained in the statutory articles of association in England.

In cases where there are dealings between a company and its shareholders, a provision for a charge on the stock may be an advantage to both, and a provision regulating the transfer so that the debt or charge will attach to the stock in the hands of the transferee would seem to me not unreasonable.

I think the power to pass by-laws as to the transfer of stock in section 31 is explained and qualified by section 44, and that the "conditions and restrictions" whereby the lien for the debt due the Company is attached to shares transferred are reasonable—I think the Company had power to pass the by-law.

I agree with my Brother Cameron that the plaintiffs had notice of the by-law and that there is no estoppel because the defendants did not value their security.

The appeal must be dismissed with costs.

CAMERON, J.A. This action is brought by the plain-



tiffs to compel the defendant Company to register them as the holders of a certificate of 25 shares of stock in the Company purchased by them from the assignees of one Dunn, the original owner. The defendant Company alleges that Dunn was indebted to it in the sum of \$907.51, and that, under the by-laws of the Company, it has a lien on the shares for that amount. The facts are set forth in the judgment of the learned Chief Justice of the King's Bench, who dismissed the action without costs.

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The first question raised upon the argument involves the validity of by-law No. 25 of the Company, which is in the following terms:

"25. The Company shall have a first and paramount lien upon all the shares registered in the name of such shareholder whether solely or jointly with others for his debts or liabilities solely or jointly with any other person to the Company, whether the period for the payment, fulfilment and discharge thereof shall have actually arrived or not, and such lien shall extend to all dividends from time to time declared in respect to such shares. Unless otherwise agreed upon, the registration of a transfer of shares shall not operate as a waiver of the Company's lien, if any, on said shares."

By-law No. 26 sets out the method of enforcing the lien so created by sale after notice.

These by-laws were duly confirmed at a general meeting of the Company.

Under the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, the affairs of every Company incorporated thereunder shall be managed by a board of directors (sec. 25), who "shall have full power in all things to administer the affairs of the Company; \* \* \* and may, from time to time, make by-laws, not contrary to law nor to the letters patent of the Company, to regulate the allotment of stock \* \* \* the issue and registration of certificates of stock \* \* \* the transfer of stock \* \* \* and the conduct in all other particulars of the affairs of the company" (sec. 31).

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By section 44, the stock of the Company is to be deemed personal estate, transferable in such manner only and subject to the conditions and restrictions as in the Act or letters patent, or in the by-laws, contained.

By section 55, no shares shall be transferable until all previous calls have been paid thereon, and, by section 58, the directors may refuse to allow the entry of any transfer whereon there may be an unpaid call.

The validity of this by-law was assumed by the Chief Justice, who had dealt with one similar in terms in *Montgomery v. Mitchell*, 18 M.R. 37. This conclusion is disputed by plaintiffs' counsel, who argued that, in the first place, the provisions of the statute did not afford foundation for a by-law creating a lien for indebtedness due to it by a shareholder, and, in the second place, that the by-law does not, and cannot be said to, "regulate" the transfer of shares.

At Common Law a company has, apparently, no lien against a shareholder which would restrict the transferability of its shares: if such a lien be claimed, authority therefor must be sought in the legislation: *Cyc.* X, 580.

The Companies Act of 1862, the governing statute in England, expressly provides that the articles of association may declare a lien on the shares of a shareholder debtor of the company. We have no such provision, and the power must, if found at all, be inferred from the general words of our Act, particularly those of section 31. The Chief Justice in *Montgomery v. Mitchell* so inferred the authority, following *Child v. Hudson's Bay Co.*, 2 P. Wms. 207, and *Societe Canadienne-Francaise v. Daveluy*, 20 S.C.R. 449.

There can certainly be nothing unlawful in the shareholder of a company and the company agreeing that his shares shall be subject to any indebtedness from him to the company. Such an agreement would surely be upheld, and it is not going very much further to say that the

shareholders of a company can pass a by-law stipulating that their shares shall be subject to a charge for any indebtedness by any of them to the company.

"It need scarcely be observed that, if it is expressly enacted or agreed by the members of a company that the company shall have a lien on their shares for all moneys which may be due from them to the company on any account whatever, a lien will be created in cases where it would not otherwise have existed." *Lindley on Company Law*, I, 637. By-laws creating a lien are "part of the contract between the society (company) and the shareholder:" per Patterson, J., in *Societe Canadienne-Francaise v. Daveluy*, *supra*, p. 470. In England the articles of association which in some cases may, and in others must, accompany the memorandum have the effect of a contract, though the nature of it is difficult to define: *Allen v. Gold Reefs of West Africa*, [1900] 1 Ch. 671, per Lindley, M.R.

In *McKain and Canadian Birkbeck*, 7 O.L.R. 241, a by-law purporting to give a lien for indebtedness of the shareholder to the company was held not applicable to a purchaser in good faith. There the validity of the by-law was apparently conceded by Mr. Justice Ferguson in the first instance, and by the Divisional Court on appeal. The company in that case was incorporated by a special Act of Parliament, and the clauses of the Companies Clauses Act, R.S.C. 1886, c. 118, were thereby made applicable. The Companies Act, R.S.C. 1886, c. 119, contains the provision, section 52: "The Directors may decline to register any transfer of shares belonging to any shareholder who is indebted to the company." This provision was carried into the revision from 40 Vic., c. 43, s. 5, and is now to be found in section 67 of the present Act, R.S.C. 1906, c. 79. It is, however, not to be found in the Companies Clauses Act, R.S.C. 1886, c. 118. This section, therefore, had no application in the *McKain* case, where the Act of Incorporation was a special statute of

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the Dominion Parliament. Now, it may be regarded as significant that no question as to the validity of the by-law creating the lien was raised in that case. On the contrary, its validity was taken for granted by all the Judges who heard it. At the same time the reason for that view may well have been that pointed out by the Chief Justice of this Court, whose judgment I have read.

That the validity of such by-laws has generally been assented to, is shewn by the following extract from *Morawetz on the Law of Private Corporations* (published in 1882) at p. 332:

"It seems that a majority in a stockholders' meeting have an implied authority to enact a by-law giving the company a lien upon the shares of its members, and to prohibit a transfer of shares from being executed upon the books while the holder is indebted to the corporation," quoting in support of this statement a large number of cases decided in various jurisdictions in the United States, and also *Child v. Hudson's Bay Co.*, 2 P.Wms. 207, already referred to, which was decided by Lord Maclesfield in 1723.

Upon consideration of the authorities and the statute, therefore, it seems to me that a by-law of a company, incorporated under our Act, creating a lien upon the shares of a shareholder in respect of his indebtedness to the company is a reasonable and proper exercise of its powers as set forth in the Act, and that, as between the shareholder and the corporation of which he is a member, it must be valid and enforceable.

If this by-law thus be valid, in what position is a purchaser for value of shares without notice of the by-law? Mr. Masten gives it as his opinion that the rule with respect to strangers being affected with knowledge of a company's by-laws is different in England from that in Canada. In England the articles of association are filed with the memorandum and are easily accessible. In Canada, on the other hand, this is not so. By-laws, being

private records, are not at the disposal of strangers to the company. The Joint Stock Companies Act, and the letters patent of incorporation, are open to all.

"But it also appears to be reasonably clear that, except in British Columbia and Nova Scotia, where the Imperial form of Act obtains, outsiders dealing with the company are not affected with constructive notice of its by-laws or want of by-laws." *Masten on Company Law*, 161.

This was the view of Mr. Justice Killam in *McEdwards v. Ogilvie Milling Co.*, 4 M.R. p. 6.

"In this case, of course, the plaintiff must be taken to have notice of all the provisions of the Joint Stock Companies Act, under which the defendant company was incorporated; and it may be, also, that he must be taken to have notice of the contents of the letters patent incorporating the company, as he could become acquainted with them by search in the office of the proper department; but farther than that he could not be expected to go."

Which is very much the same as was stated to be the law in England by Jervis, C.J., in the well-known case of *Royal British Bank v. Turquand*, 5 E. & B. 248, and 6 *Ib.* 327, cited in *McEdwards v. Ogilvie*.

"We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more."

The conclusion would seem to be that there was here no duty imposed on the plaintiffs to enquire further into the rights and powers of the Company than to examine the Act and the letters patent. But, if they were not affected with knowledge of the by-law in question, to what extent and when did they become affected with knowledge of the Company's claim against the shares? The Chief Justice of the King's Bench found that they had notice of the lien, but not prior to their acceptance of the offer to purchase, August 28th. Mention was made of

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the claim at a meeting of July 24th, but this, he held, could not affect the plaintiffs. Mr. Laing, however, had notice of the claim some time after August 28th, and on or before November 10th. The transfer was executed December 27th, and then forwarded to the Company for the purpose of being registered. The Chief Justice held that, as, on the date of the meeting of November 10th, the plaintiffs owed the assignees on account of the purchase the sum of \$30,059.74, they still had ample funds out of which they could discharge the lien on the shares, a clear title to which had been guaranteed by the assignees. It was on this ground that he held the defendants not debarred from asserting their lien and dismissed the action.

The equitable doctrines relating to purchasers for value without notice apply to shares as to other property, but, in applying these doctrines, it is to be remembered that the purchaser must have acquired the legal title to the shares or, at all events, an absolute and unconditional legal right to be registered in respect to them: *Lindley*, 658; and this legal title or right must have been acquired without notice of the equitable title affecting the shares and, if it be acquired with notice, then the prior equity must prevail. *Ib.* 659.

Under section 57 of our Act a book is to be kept to record all transfers of stock with particulars thereof and, under sec. 59, no transfer shall be valid for any purpose whatever until the entry thereof is duly made in such book, save as exhibiting the rights of the parties *inter se* and as rendering the transferee liable jointly with the transferor to the Company. The stock certificate in this case on its face says that the shares are transferable only on the books of the Company upon the surrender of the certificate, so that, not until after the execution of the transfer on December 27, 1911, and not until the actual surrender of the certificate, did these plaintiffs acquire "a

present, absolute, unconditional right to have the transfer registered:" per Lord Selborne in *Societe Generale de Paris v. Walker*, 11 A.C. 29. The plaintiffs in this case (deriving their title from assignees for the benefit of creditors) have not shown legal title to the shares or an absolute and unconditional right to be registered in respect thereof before they were affected with notice of the Company's claim upon the shares. They are not, therefore, in a position to have that claim nullified or postponed.

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It is contended that the defendant Company by its acts and conduct elected to abandon its security by way of lien in filing an affidavit of claim without declaring that security, by voting thereon at meetings of creditors, and by accepting a dividend on the claim as proved. In *Re Barned's Banking Co.*, L.R. 3 Ch. 776, it was held that a secured creditor is entitled to prove for the amount due at the time his claim is sent in without regard to securities realized by him between sending in his claim and its being adjudicated upon.

"The bargain by my debtor is that he will pay me, and I am entitled to insist upon that. I have also a pledge in my hands, which no one can take away from me without paying me in full, and it is for me to say when I will choose to realize that pledge": p. 776. That is to say, the position of the creditor was not altered in this respect by the Winding Up proceedings to which the Chancery rule applied. The nature of the contract between the parties is not varied by the insolvency of the debtor, and in this respect the Chancery rule is followed. Unless, therefore, the creditor is here barred by the effect of the statute, its legal position is not altered. The provisions of sec. 29 are imperative, as were those of rule 8 of Schedule I of The Companies (Winding Up) Act, 1896, referred to in *Re Henry Lister*, [1892] 2 Ch. 420; but in the case of that rule the creditor is deemed to have surrendered his security unless he procures further time to remedy the

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omission. There is no such penalty imposed by section 29. There is no provision that the creditor shall, because of his omission to state his security, forfeit either his security or his original claim. We would hardly be justified in reading words into the section which would impair a creditor's rights under the existing law, or take away his property on account of some act or omission on his part wholly devoid of wrongful intent. Section 31 provides that where a creditor fails to value his security he may, after certain proceedings have been taken before a Judge, be wholly barred as against the estate. In default of an express provision as to forfeiture in the statute, I can see no reason for holding that the omission to mention the security in the affidavit can be taken to constitute an abandonment by the Company of its security. The omission was, after all, an oversight, and there is no difficulty in rectifying, at this stage of the assignment proceedings, whatever misunderstandings have arisen therefrom.

The defendant, having, by its representative, consented to the sale, is, it is urged, estopped from now questioning it. But it does seem to me that it is not open to the plaintiffs to take this ground. If, at the time they agreed to purchase, to wit, on August 28th, they received, as part of the transaction, the certificate of stock and a duly executed transfer, which they had forthwith presented to the officers of the Company for registration, then their position in this aspect of the case would seem to me unassailable. But it was not until after they received notice of the defendant's claim that they procured a transfer of the certificate and attempted to secure its registration, and, as the Chief Justice points out, they had notice of the defendant's claim before paying over the whole of the purchase money. I consider, therefore, that the defendant has a lawful lien on the shares in question, of which the plaintiffs had due notice,



and that the defendant's right of property cannot be impaired unless the conduct of the Company or its representatives in the transaction has placed the plaintiffs in a position where they must, by reason of such conduct, sustain a loss. But that is not the case here, where it is still feasible to administer the estate without injustice to any one.

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The by-law does not expressly give the directors power to decline to receive the transfer for registration, because of an existing indebtedness of the registered shareholder. Indeed, an attempt to do so would apparently be nugatory on the authority of such cases as *Re Panton and Cramp Steel Co.*, 9 O.L.R. 3, and *Re Imperial Starch Co.*, 10 O.L.R. 25. The restrictions that can be so imposed are merely of a formal character. But here we have a transfer of a certificate of shares, upon which the Company has a lien, knowledge of which has come to the transferee before the execution of the transfer, and before the transaction of purchase is finally completed by payment, presented to the Company with a peremptory demand for its registration. Surely the Company must have the right to say that it will agree to register the certificate upon recognition, or payment, of the lien and not before.

I think the Chief Justice was right in dismissing the action.

HAGGART, J.A. I agree with Mr. Justice Cameron and can add little to the reasons given by him.

It is not surprising that the validity of such by-laws as that in question here should have been generally assumed, when we recognize that such a by-law is reasonable, in the interests of the Company, and for the benefit of every shareholder excepting the delinquent debtor.

I think it is within the statutory powers conferred by R.S.M. 1902, c. 30, s. 31. It is "not contrary to law nor the letters patent." It relates to the "issue and registra-

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tion of certificates," "the transfer of stock" and "the conduct in all other particulars of the affairs of the Company."

If there were any doubt as to the authority given under section 31, it would be removed by section 44 which says: "The stock \* \* \* shall be transferable in such manner only and subject to all such conditions and restrictions as herein or in the letters patent or in the by-laws of the Company are contained."

The by-law is not a prohibition as contended by the plaintiffs. It is a regulation providing for the formality of paying any debt owing to the Company by a shareholder before he can sever his connection with the Company and substitute whomsoever he likes as his successor.

I do not think what the defendants did constituted a final and valid election. It was not a deliberate and decisive act with knowledge of all their rights and of all the facts. The filing of the claim in its original form with the assignee was a mistake by a member of a firm of solicitors who was not instructed as to all the facts. Even if, by mistake, an action is actually commenced it is not conclusive. "A person who prosecutes an action or suit based upon a remedial right which he erroneously supposes he has, and is defeated because of the error, has not made a conclusive election and is not precluded from prosecution or suit based upon an inconsistent remedial right." *Cyc.* vol. 15, p. 262.

The plaintiffs' chain of title shows that they can have no rights as against the defendants superior to those of Dunn. They hold Dunn's property subject to the obligations imposed upon it by Dunn.

I would dismiss the appeal.

RICHARDS, J.A., and PERDUE, J.A., concurred.

*Appeal dismissed.*

## COURT OF APPEAL.

## PHALEN V. GRAND TRUNK PACIFIC RAILWAY.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, JJ.A.

*Railways—Negligence—Defect in system, ways, works and appliances—  
Failure to make flying switch caused by car coupler not working properly—Want of proper inspection of coupler.*

The plaintiff and other members of the crew of a train on the defendant's railway were engaged in an attempt to make a "flying switch," so as to place the end car on a siding without any of the other cars passing over the switch. For the success of this operation it was necessary to uncouple the end car just before it reached the switch and for the engineer then, in obedience to a signal, to apply the brakes and stop the rest of the train quickly so that the end car thus released would run into the siding of its own momentum. The plaintiff's duty was first to throw the switch and then to climb by a ladder to the top of the end car and be ready to apply the hand rake at the top so as to bring the car to a stop at the proper place on the siding. The coupling pin, however, could not be withdrawn, and, when the engineer applied the brakes, the end car with the plaintiff on top of it was suddenly checked with the rest of the train, causing the plaintiff to fall off in front of it. It ran over him and cut off one of his arms.

The jury at the trial found the defendants guilty of negligence "through lack of proper inspection."

Before the making of the attempt, two of the men had looked at the coupling in question as well as the others on the train and found nothing wrong with it, but after the accident it was discovered that there was an accumulation of ice and snow in the interior of the coupling which was the reason why the man could not pull out the pin. This trouble was one that would not be noticed by any person merely looking at the outside of the apparatus.

*Held, per PERDUE, CAMERON and HAGGART, JJ.A., that the inspection that had been made was, upon the evidence, all that was usual in such operations and was reasonably sufficient and that there was not sufficient evidence to warrant the finding of the jury that there was a lack of proper inspection causing the accident.*

*Smith v. Baker*, [1891] A.C. 348; *Webster v. Foley*, 21 S.C.R. 580, and *Schwoob v. Michigan Central*, 13 O.L.R. 557, followed.

Appeal from verdict in favor of plaintiff allowed with costs, and verdict entered for defendant with costs.

*Per* HOWELL, C.J.M., and RICHARDS, J.A. The jury might have thought that it was incumbent on the defendants, under the circumstances, to have a more careful inspection, or a test made, of that particular coupling to see if it was in working order before attempting the

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— flying switch, as the success of the attempt was dependent on the coupling working properly. If so, that was a reasonable view to take and there was sufficient evidence to justify them in their finding and the plaintiff's verdict should stand.

DECIDED: 27th June, 1913.

Statement.

THE plaintiff brought this action to recover damages for injuries received in an accident at the town of Melville in Saskatchewan, when the wheel of a car passed over his right arm, owing, it was alleged, to the coupling apparatus between two of the cars failing to respond to the lever when he tried to operate same.

The case was tried before Curran, J., and a jury when a verdict was entered for plaintiff for \$6,000.

Defendants appealed.

*R. M. Dennistoun, K.C.*, and *A. Hutcheon* for defendants, respondents, cited *McGraw v. Toronto Railway Co.*, 13 O.W.R. 131; *Andreas v. C.P.R.*, 37 S.C.R. 1; *Lloyd v. Woolland*, 19 T.L.R. 32; *Scott v. C.P.R.*, 19 M.R. 167; *Schwoob v. Michigan Central*, 13 O.L.R. 557; *Jackson v. G.T.R.*, 2 O.L.R. 689; 32 S.C.R. 245; *Rostrum v. C.N.R.*, 22 M.R. 250; *Ferguson v. C.P.R.*, 12 O.W.R. 943, 947; *Readhead v. Midland Ry. Co.*, L.R. 4 Q.B. 379, and *Richardson v. Great Eastern Ry.*, 1 C.P.D. 342.

*M. G. Macneil* and *B. L. Deacon* for plaintiff, respondent, cited *Falconer v. Jones*, 24 O.W.R. 18.

HOWELL, C.J.M. It appears that a freight train was brought into the station and the engine was cut off and taken to the round house. There was a casual inspection with a lantern and the couplers were casually looked at and the wheels tapped.

There were orders to cut out from the train a Grand Trunk car and put it on a siding and to do this a yard engine was coupled to the train, head on, and then all the rear end cars up to the one to be shunted—about ten or twelve—were uncoupled and the yard engine pulled out the rest of the train, having the car to be shunted at the

rear end. Having taken these cars near the switch where this one was to be placed, Taylor, the conductor of the freight train, Ault, a switchman, the engineer and the plaintiff prepared to make a flying switch. To do this it was necessary for the engineer to sharply back the train, "give it a kick," and this must be followed by Ault lifting the lever to disconnect the coupling to separate this last car from the train, and the plaintiff must, at the same time, climb on this last car so as to apply the brake to stop the car at the proper place on the siding. It was the duty of the engineer, after giving the train a sharp quick start, to abruptly stop it so that the car to be shunted would be sent into the siding and the train stop short of the switch. The plaintiff climbed up the ladder at the rear end of the car, and when Ault attempted to uncouple the car properly after they had been pushed together, the lever would not lift the pin or block and the car remained attached to the train and when the engineer applied the brakes, and perhaps also reversed suddenly to stop the train, this last car was also suddenly stopped and the plaintiff was thrown off the car at the rear end and his right arm was cut off.

All these men depended upon, and the whole work depended upon, the car being disconnected at the right moment, in other words, all depended upon the lever lifting the pin of this one coupling at the right moment. As I understand this coupling, the cars must be pushed together or "in the slack" before there can be uncoupling. It might be unreasonable to expect an examination of each coupling of a train on arrival, but it does seem to me that, where there is to be an uncoupling as in this case, and where so much depends upon the lever lifting the pin at the right moment, and where it could be so easily tested just before the engineer gives "the kick," it would not be unreasonable to expect an examination or test of the coupling in question to see if it was in working order

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just before this operation began. Witnesses for the defendants shew that there is a liability to jam by reason of cinders, sand, gravel and ice, and therefore the greater necessity for testing or inspecting.

The coupling was not at that time in working order and this caused the damage to the plaintiff. The jury say the plaintiff was not negligent. They say the defendants were negligent and that their negligence caused the damage to the plaintiff.

In answer to a question as to the negligence of the defendants, the jury answer: "Through lack of proper inspection." Perhaps the jury thought that, just before the final shunting, the lever should have been inspected and tried to see if the coupling upon which so much depended was in working order. The train had just come in from a long run and I would think it reasonable that, before the flying switch was attempted, there should be a test when the portion of the train was ready to back for that switch, to see if the particular coupling upon which so much depended would operate at the critical moment.

Counsel for the defendants did not argue the question whether an action would lie here for this wrong, and apparently admitted that the law of common employment did not apply.

The majority of the Court differ from me by holding that there was no evidence of negligence upon which the jury could find as they did, and it would be idle for me to follow the question further.

I think there was evidence upon which they might find as they did. Whether upon that finding an action will lie in this Court need not be discussed, as the decision of the majority of the Court disposes of the case against the plaintiff.

RICHARDS, J.A. In reply to the first question, the jury found the defendants guilty of negligence. To the second

question, asking in what the negligence consisted, they replied: "Through lack of proper inspection."

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The use of the word "proper" makes it somewhat doubtful as to what was meant by that answer. If it implied that the jury believed that, on the arrival of the train at the place of inspection, all the couplings in the train should be tested by raising the pins, to shew that the couplings were all in working order, I think they were asking a degree of care that is impossible in practical working. Such an inspection might disconnect the whole train.

But it does not seem necessary to imply that they took that view. The inspector made some sort of an inspection of the train when it came in and, if he did not, in passing the coupler in question, look carefully enough to see if there was snow or ice visible on its top, then his inspection was not a proper one. It seems to me that that might be the view taken by the jury in answering the question.

Then was such a view justified by the evidence? Neill swore that he did look at the coupler and that there was no ice or snow on it, and his assistant, Couchman, who was a witness for the plaintiff, says there were no visible signs to shew that there was anything wrong with the coupler. But, though he says he inspected the coupler twice, he does not, so far as I can see, say definitely that either of such inspections was made before the accident.

On the other hand, it was sworn by Ault, a brakeman of experience, that, if ice and snow could get into the throat of the draw-bar, sufficiently to block the pin, it would leave traces on the outside. Mr. Cowan, a witness called by the defence, and a man of large experience, also swore that if water got into the coupling and froze it must leave traces on the outside. In re-examination he stated that he had known cases where there was ice inside

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Judgment. occurrence.

RICHARDS,      It seems to me that, on the above and other evidence ad-  
J.A.      duced as to the likelihood of traces being left outside, the  
jury would be justified, if they chose to do so, in dis-  
believing the story that there were no traces of snow or  
ice on the coupling when the train came in.

Then again, it is sworn by Ault and Couchman that striking the coupler on top and bottom would loosen up any ice in it sufficiently to make the lever work. There was no evidence to shew that that was done in this case before the accident.

The jury may have thought that, in such cold weather as prevailed at that time, the inspectors should, in passing, not only look carefully at each coupler, but strike it top and bottom with their hammers, or, at any rate, that that should have been done to the coupler in question before cutting out the car. That could easily be done, and I think they would be justified in holding (if they did so hold) that not doing it was an act of negligence.

There was evidence that, after the accident, the coupler in question would not open after being struck. Perhaps the jury disbelieved that. It was their right to do so if they chose. The failure to so strike the coupler is, perhaps, not strictly covered by the word "inspection" in the answer to the second question, but I do not think the language of a jury's answers should be too closely criticised, if we can find a meaning that they might have intended, and which they could find evidence to support.

I have felt some doubt whether the defendants were liable, because of Neill and his assistant, who are charged with being guilty of the negligence, being, with the plaintiff, fellow servants of the defendants, and acting as such in the matters complained of. But that defence, if it existed, was not raised before this Court, or, so far as I am aware, at the trial, and I do not feel called upon to



deal with it now. It may be that that defence was not open to the defendants on the pleadings.

On the whole, I am of opinion that there was evidence from which the jury could find that the inspection, before the accident, was so insufficient as to shew negligence, and that they could also find that such negligence was the cause of the plaintiff's injuries.

I would dismiss the appeal.

PERDUE, J. A. This is an action brought to recover damages for an injury sustained by the plaintiff in an accident which occurred at Melville, Saskatchewan, in January, 1912. The plaintiff was at the time a switchman in the employ of the defendant Company and he was injured while performing his duties. The action is brought for non-compliance with the Railway Act, and also at Common Law. The plaintiff alleges that the accident occurred through the failure of the Company to supply proper appliances for uncoupling cars, and supplying defective machinery and appliances, neglecting to inspect or repair, employing unskilled persons, etc.

The operation in which the plaintiff and others were engaged, when the accident occurred, was a simple and ordinary one. A car was to be cut out of a train and switched on to a siding. When the signal was given to uncouple the car from the moving line of cars so that it would move of its own momentum into the siding, the coupler failed to work. The car, instead of being released from the others, was checked suddenly when the brakes were applied from the engine, with the result that the plaintiff fell from the top of the car upon the tracks, and the car, which had not been completely stopped, passed over his right arm and cut it off. The plaintiff had climbed to the top of the car for the purpose of applying the brake so as to prevent it from colliding with other cars upon the same siding.

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The train to which the car in question was attached had arrived at Melville on the same night that the accident occurred. The coupler which failed to work was attached to the car adjoining the one from which the plaintiff fell. Immediately after the accident, several of the defendant's employees attempted to move the lever of the coupler but it failed to raise the pin which unlocks the knuckle. The pin for some reason which was not visible remained fast. The car was then uncoupled by using the lever and pin upon the opposite side of the car. The car to which the coupler in question was attached was then taken away to another track and Neill, the car inspector, took the coupler apart in order to find what was wrong with it. He found that the interior cavity where the knuckle lock rests was filled with ice and snow. He cleaned it out, put the parts together again and found, as he states, that the coupler then worked well. He states that, apart from the ice and snow in it, the coupler was in first class condition. Neill's evidence as to the condition of the coupler and the cause of its failure to work is wholly uncontradicted.

When the train in question arrived at Melville on the night of the accident it was inspected by Neill and his assistant. They both state that they looked at all the couplers upon the cars and could see nothing wrong with them. Couchman, who was Neill's assistant, was called by the plaintiff. He did not appear, as far as one can gather from the evidence, to be unfriendly to the plaintiff. He says that Neill and he inspected the train, that they inspected the coupler in question, and found nothing wrong with it. He further says that from the outside one could see nothing wrong with it. He also stated that, even if the coupler were opened, the ice and snow in the chamber would not be visible. He says that there was no ice or snow on the outside of the coupler when they inspected it.

Section 264 of the Railway Act compels the Company to provide automatic couplers which can be uncoupled without the necessity of men going in between the ends of the cars. The evidence shews that the coupler in question was one of the best, if not the very best, coupler that can be obtained. It, like every other mechanism, is not perfect and its working may be interfered with by cinders or gravel or ice getting into the interior of the lock. The evidence shews, to my mind conclusively, that, when a car is en route in a train, the only practical inspection that can be given to the couplers is to examine them from the outside without actually trying if they will work. To try the couplers to see if they would work would mean detaching all the cars from each other. This might lead to serious consequences if the train were standing on a grade. To test the coupler of each car about to be shunted would be almost equally as impracticable, as it would mean the premature disconnection of the car and the recoupling of it again. The evidence shews that the inspection made on the night in question was the only practicable one.

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In his statement of claim the plaintiff alleged a number of acts of negligence on the part of the defendants as having caused the accident, but it all came down to the failure of the coupler to act. The learned trial Judge said to the jury, "there can be no question that this accident happened and was practically due to that failure of the lever to work." He gave the jury a number of questions to be answered, amongst which were the following, along with the answers given:

"1. Q. Were the defendants guilty of negligence?  
A. Yes.

"2. Q. If so, in what did this negligence consist?  
A. Through lack of proper inspection.

"3. Q. If the defendants were negligent, was the in-

1913 jury to the plaintiff caused by their negligence!  
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No doubt, in giving these answers, the jury had the failure of the coupler in their minds, but they do not find what was the defect in the coupler which inspection would have disclosed. Failure to inspect was not in itself the direct cause of the accident. There must have been some thing wrong with the coupler which caused it to fail and the jury made no finding as to this. In the absence of such a finding the verdict cannot stand.

The plaintiff called no evidence to shew any defect in the coupler. He rested his case on the fact that at the critical moment it had failed to act. On the other hand, the evidence of Neill clearly, and to my mind convincingly, shews that the failure of the coupler to work was caused by ice or snow which had filled the chamber so that the pin could not be moved. If this was the true cause, the coupler was not mechanically defective or out of repair. It was temporarily prevented from working through a foreign substance getting into it accidentally. If this foreign substance was ice it must have got there shortly before the accident. The defect, if it can be called a defect, was a latent one which was not discoverable on the inspection made by Neill and Couchman—the only inspection that was practicable, as the evidence shews. If, then, Neill's statement that ice in the coupler caused its failure to work is to be believed (and it is wholly uncontradicted and no evidence is given of any other defect) the defendants cannot, in the absence of proof that they knew or should have known the condition of the coupler, be held liable for the accident.

The trial Judge commented strongly upon the fact that Neill made the inspection alone, without any one to corroborate his statement as to the condition of the coupler. In effect he told the jury that they might disbelieve Neill if they chose. Neill was not at the time the trial took

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place in the employ of the defendants and, seeing that his evidence was absolutely uncontradicted and that no other evidence was given to shew what was wrong with the coupler, the absence of corroboration was not a serious objection. But, if Neill's evidence is to be disregarded, what was the actual defect in the coupler? The jury has not found any defect, and there is no evidence, except Neill's, to shew why it failed to act. The only negligence they can find on the part of the defendants was "lack of proper inspection." We are not enlightened as to what a proper inspection would have disclosed or how the lack of inspection caused the injury to the plaintiff.

The finding as to lack of proper inspection is directly contrary to all the evidence given upon the question of inspection. The plaintiff's witness, Couchman, gave the following evidence:

"Q. The cars are inspected when they come in to find out if anything of that kind is wrong with them?

A. Well, with regard to that locking block it is impossible to do that because in releasing the block you would set your cars all adrift.

Q. You say you cannot pull these cars apart when the train comes in because you would set your cars all adrift?

A. Yes.

Q. So that there is no system that you could have for pulling the pins? A. No, they could hardly inspect them in that way because that would cut your cars adrift.

Q. So that you have to be content with an inspection by the eye from the outside? A. Yes."

This agrees with the evidence given by the defendants' witnesses and shews that the only feasible inspection of the couplers on cars attached to a train when it arrives at a station is one similar to that made by Neill and Couchman, when the train in question stopped at Melville.

The brakeman Ault, when called by the plaintiff in rebuttal, said that, in order to make out his report on the night of the accident, he asked Taylor, the yard foreman,

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what was wrong with the block and Taylor said the block was jammed. Taylor denied making that statement. The learned trial Judge said to the jury: "If he did (make the statement) it throws an entirely different reason forward for the failure of that lever to work to that assigned by Neill. It assigns a reason that would shew a defect in that block through wear or tear or accident to it that was not occasioned at all by the elements, as suggested by the defendants." With great respect, I must differ from the trial Judge as to the meaning and effect of the expression attributed to Taylor, supposing the latter made use of it. Taylor was not present when Neill took the coupler apart and examined it. Taylor did not know what was wrong with it. If Ault asked him what was wrong with the block, he might very properly say that it was jammed without meaning that it was defective. The words might bear the meaning that the block was prevented from moving by some foreign substance getting in and wedging it tight. But a vague expression used by the yard foreman, who had no knowledge as to the real condition of the coupler, was not evidence upon which the jury could find that there was an actual defect in the block. In any event the jury has not found that there was such a defect.

The plaintiff had to establish at the trial some act of negligence on the part of the defendants which gave him a right of action against them. "Liability only attaches to negligence which is either the sole effective cause of the injury complained of, or is so connected with it as to be a cause materially contributing to it. Negligence is the effective cause of an injury when it has in fact brought about that injury as a direct and natural consequence:" 21 *Halsbury*, p. 378, and cases cited. Failure to make a proper inspection would not give the plaintiff a cause of action, unless it was shewn that the inspection would have discovered a defect in the apparatus which was the direct

cause of the accident. Then, the failure of duty to inspect would bring home to the defendants liability for the defect which inspection would have disclosed.

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In this case no defect has been found by the jury. The evidence of Neill shewed that the failure of the mechanism to act as it should have acted was caused by the accident of snow or ice getting into it. This was something against which the defendants could not guard and for which they are not responsible. Neill's evidence was uncontradicted. It gives a reasonable explanation, one which was in accordance with the opinions given by the expert railway men called by the defendants.

With all the facts before them, the only negligence the jury found was "lack of proper inspection," a negligence which, of itself, could not have caused the accident. I see no reason for granting a new trial. All the facts seem to have been brought out and the plaintiff has certainly no reason, from his standpoint, to complain of the manner in which the trial Judge directed the jury. There may, no doubt, be great sympathy for the plaintiff in the severe injury he sustained and a natural desire that he should obtain compensation. But, if he had taken advantage of the Saskatchewan Workmen's Compensation Act, he might have recovered reasonable compensation without having to prove actionable negligence on the part of the defendants. He deliberately chose to bring an action in this Province, based upon common law or statutory liability which he has failed to establish.

I think the appeal should be allowed and a verdict entered for the defendants. If the defendants ask for costs they are entitled to them in both courts.

CAMERON, J. A. The accident in question here took place on January 19, 1912, at the Town of Melville in Saskatchewan, on a dark night when the temperature was some 20 to 25 degrees below zero. The plaintiff was a brakeman and switchman in the employ of the defendant

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Company. Freight train No. 91 had arrived about 8.30 in the evening. A switch engine had been attached to the west end of this freight train and car No. 21852 of the Grand Trunk Railway Company was to be taken out and put on a siding. Immediately next car No. 21852 was Grand Trunk Pacific car No. 357818. Orders to cut out car No. 21852 were given by Taylor, the yard foreman. Ault, a switchman employed by the defendant Company, was working with the plaintiff. The plaintiff threw the switch and Ault went to cut off the Grand Trunk car. When the plaintiff threw the switch, the train pulled up, then stopped, then came on and he got on the Grand Trunk car. The signal to the engineer to stop was given by Ault and the plaintiff. The signal to the engineer, to give the train a kick, was given and then the signal to stop by the plaintiff, by Ault and by Taylor. The plaintiff climbed on the Grand Trunk car and, as he was doing this, he gave the signal to stop. There was a down grade at the point and the plaintiff's object in getting on the car was to set the hand brakes which were at the west end of the car at the east end of which he had climbed up. To reach the brakes he started to go along the running board on the top of the car, and when the jerk came he was thrown off the car backward and came down on the ground with his right arm on the rail. The wheels of the car passed over his right arm. The reason of his fall was that the automatic coupling apparatus, between the two cars mentioned, had for some reason failed to respond to the lever and held the car on which he was instead of allowing it to proceed. It was Ault's duty to operate this apparatus, and this he tried vainly to do three or four times, but failed, and then he gave the engineer the signal to stop, which he did when he heard the plaintiff's cry. Ault found the plaintiff under the Grand Trunk car and about twelve feet from the eastern end of the car in between the two trucks.



Neill, car inspector at Melville, gave evidence that he and his helper, Couchman, had made an inspection of Train No. 91, on its arrival on the evening in question. He made an inspection to see if everything was proper by slipping a lantern in between the draw-bars. "That," he says, "is all that is necessary:" p. 107. He found, immediately after the accident, that the operating lever on the Grand Trunk Pacific car would not work. He pulled the lever and struck the pin underneath with a hammer, but without result. Then he opened the coupling by the lever on the opposite side on the corresponding coupling on the Grand Trunk car. Neill then had the Grand Trunk Pacific car taken to the round house where he made a close examination of it, taking the apparatus to pieces, on the inside of which, where the "knuckle lock" (or pin as it is sometimes called) rests, he says he found snow and ice. He cleaned this out, he says, and the apparatus then "worked fine," and the car went out westward that night on No. 91. The coupling in question was not produced at the trial, but one of the same design was, and was also placed before us for examination.

With reference to the inspection of the couplings on the arrival of the train, Neill gave this account at pp. 93 and 104:

"Q. We are told that on the evening in question No. 91 came in some time in the evening. Do you know whether she did or not? A. Yes, she did.

Q. Did you have any duty to perform in connection with No. 91? A. Yes, I had to look it over on arrival.

Q. How did you perform that work? A. I went along one side, and my helper, Mr. Couchman, went along the other, and we made a close inspection to see if we could find any defects.

Q. Did you carry anything in your hands? A. We carried a lantern.

Q. And a hammer? A. Yes.

Q. What inspection did you make of the wheels? A. We see if there is anything wrong and sometimes we tap them.

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Q. What inspection, if any, did you make of the couplings? A. We looked at them.

Q. Are you able to do anything more than look at them? A. We tap them and see if they are cracked or not.

Q. Did you go over that train that night? A. We did.

\* \* \* \* \*

Q. Would it be practicable for the inspector going through the yard to lift the pin when there is no engine on the train? A. No, it is not practicable.

Q. Is it practicable when you are inspecting a train to pull the pin on the train? A. No.

Q. Why not? A. Because when we pull the pin it is not often you can go and look over the train without there is pressure upon it; it takes very little pressure on the pin to hold it, and you cannot move it if there is any pressure upon it at all.

Q. So that makes it impracticable to pull the pins in all the cars in the yard? A. Yes."

Couchman's evidence as to the inspection of the train on arrival is given at p. 182. Couchman says that they examined the coupler that night, and he saw no ice or snow upon it. As to the usual method of inspection, he says:

Q. The cars are inspected when they come in to find out if anything of that kind is wrong with them? A. Well, with regard to that locking block it is impossible to do that because in releasing the block you would set your cars all adrift.

Q. You say you cannot pull these cars apart when the train comes in because you would set your cars all adrift? A. Yes.

Q. So that there is no system that you could have for pulling the pins? A. No, they could hardly inspect them in that way because that would cut your cars adrift.

Q. So that you have to be content with an inspection by the eye from the outside? A. Yes."

Ault also says, at p. 180, that there was no indication of ice on the outside of the coupler. So also Taylor, at p. 126.

Hooper, the car foreman for the defendant company at Winnipeg, of over thirteen years experience, whose duties comprised the examination of couplers to ascertain defects, says that this coupler was of a kind recognized as standard and adopted by the Master Car Builders Association. After describing the causes that might prevent such a coupler operating or being operated satisfactorily, he gives the following evidence:

"Q. How can you detect the presence of obstructions of that kind in the couplers? A. It is a pretty hard proposition.

Q. Why so? A. You take a man coming along, his duty is to inspect every visible part that he can see about the coupler, but when he goes to pull and cannot do it, what does that mean, the slack runs out and he cannot pull it, and, if he undertakes to go over each lever to see that it works, that is not practicable in railway work.

Q. Can you see the defects that you have mentioned inside the lock without opening the coupler? A. No.

Q. And in order to do that you would have to uncouple the cars? A. Yes.

Q. Is that a practicable thing to do in railway business? A. No, it is not."

And at p. 154 he says he is unaware of any other system of inspection than that described by the yard foreman Taylor.

McGowan, general car foreman of the Canadian Northern Railway Company at Winnipeg, with an extended experience, gives similar evidence as to the coupler in question, some of which are used on his road. The inspection after the arrival is visual, by the light of lanterns if at night, and he knows of no other or better system and an uncoupling of the cars separately for purposes of examination would be impracticable.

There is really no evidence on the subject of inspection save that for the defence. Couchman, it is to be noted, was, however, called for the plaintiff.

At the conclusion of the case the learned trial Judge

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submitted certain questions to the jury, which, with the answers given, are as follows:

"1. Q. Were the defendants guilty of negligence?

A. Yes.

2. Q. If so, in what did this negligence consist?

A. Through lack of proper inspection.

3. Q. If the defendants were negligent, was the injury to the plaintiff caused by their negligence? A. Yes.

4. Q. Could the plaintiff by the exercise of reasonable care have prevented the accident notwithstanding the defendants' negligence? A. No.

5. Q. If so, in what way?

6. Q. If both parties were negligent whose negligence really caused the accident? A. Defendants' negligence.

7. Q. If you find for the plaintiff at what sum do you assess his damages? A. \$6,000. Unanimous vote."

Upon these answers the trial Judge entered judgment for the plaintiff for the amount awarded.

The duty of the Railway Company in this and other like matters is discharged by its supplying suitable appliances or apparatus and proper supervision of the same. The whole question is discussed in *Beven on Negligence*, at p. 608 *et seq.* The duties of the master are to supply machinery of ordinary character and reasonable safety. "Reasonably safe" means safe according to the usages, habits and ordinary risks of the business. The test is always the same and, even if juries are convinced that there is a less dangerous way, they cannot be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way giving rise to a liability. *Ib.* p. 614.

"All that the master is bound to do is to provide machinery fit and proper for the work, and to take care to have it superintended by himself or his workmen in a fit and proper manner:" per Lord Wensleydale in *Weems v. Mathieson*, 4 Macq. 227, cited in *Beven*, p. 613.

"Where a master takes all such precautions as a man of ordinary prudence and skill, exercising reasonable fore-

sight, would use to avert danger, he is not responsible because he may have omitted some possible precaution which the after events suggest he might have resorted to." *Ruegg*, p. 52.

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"It is an implied term of the contract of service at Common Law that a servant takes upon himself the risks incidental to his employment. Apart from special contract or statute, therefore, he cannot call upon his master, merely upon the ground of their relation of master and servant, to compensate him for any injury which he may sustain in the course of performing his duties, whether in consequence of the dangerous character of the work upon which he is engaged or of the break-down of machinery or of the negligence or default of his fellow servants or strangers. The master does not warrant the safety of the servant's employment; he undertakes only that he will take all reasonable precautions to protect him against accidents." *Halsbury*, XX, p. 119, 120. This is the doctrine laid down by Lord Watson in *Smith v. Baker*, [1891], A.C. 348, and followed by our Supreme Court in *Webster v. Foley*, 21 S.C.R. 580.

In his charge to the jury the learned trial Judge expressly directed their attention to the evidence bearing upon the condition of the coupler, and to the question whether in fact it had been maintained in a satisfactory working condition. But the jury declined to find any defect in the coupler itself. They merely found that the negligence, the cause of the accident, consisted in lack of proper inspection, which I take to be the meaning of their answer. It may be suggested that the answer to the question, put as it stands, really presupposes or assumes a further answer, viz.: that the coupler itself was defective, a fact which could have been discovered, in the view taken by the jury, had there been a proper inspection. But this is to add to the findings of the jury, and it would seem to me we cannot do that. If we did, we would really be making a finding inconsistent with that made by the jury, which is that the proximate cause of the accident was the want of

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proper inspection. Thus we would be setting aside that finding and holding that the proximate cause was a defective coupler or some other cause which was not present in the minds of the jury, or they would have stated it.

In *Schwoob v. Michigan Central*, 13 O.L.R. p. 557, the action was brought to recover damages for the death of the deceased by reason of escaping steam from a boiler. Certain questions were asked of the jury which were answered in such a way as to indicate that the jury considered the defect in the locomotive "occurred by the defendants not supplying proper inspection." The jury were then directed by the trial Judge to return and answer certain other questions, which they did, shewing that the defect was in the way one Jeffers, a fellow workman, had put in a tube in the boiler, which tube was not properly "belled." It was held by a majority of the Court of Appeal that there was no action at Common Law, but relief was given under the Ontario Compensation Act. But Osler, J.A., who gave the majority opinion, held that "want of inspection, unless there was some existing defect which inspection would have disclosed, is not defect, or, by itself, negligence."

It was only by reading into the original the subsequent answers that there was held to be any liability at all under the Compensation Act.

On the other hand, Meredith, J.A., held that the answers to the additional questions meant no more than those to the original questions and that the effect of all of them, to his mind, was that the jury had found that the proximate cause of the accident was want of proper inspection only, and, in that view, I consider his judgment as in point in this action, and, amongst other findings, he held that the judgment in question could not be supported at Common Law, as the finding, "not providing proper inspection," was too indefinite, not supported by reasonable evidence and could not be supported at Com-

mon Law, because there was no finding that the negligence of the workman was the proximate cause of the accident, but an implied finding to the contrary.

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Now there is, in my opinion, no evidence whatever to support the finding of want of proper inspection. Were the jury at liberty to, and did they in fact, wholly reject the evidence of Neill and Couchman that they made any such inspection as they deposed to? Did the jury mean to say that there was in fact no inspection whatever? I take it not so. Their finding involves the idea that there was an inspection, but that it was not proper or sufficient in the circumstances. Yet the whole evidence on this branch is to the effect that the couplings were of the best make and that the defendant Company took the precautions with respect to them in the way of inspection such as are ordinarily taken by railway companies, and that such inspection was made as was practicable under the circumstances. It cannot be said, on the evidence as I read it, that there was any lack of exercise of ordinary care and precaution. The only certain method of guarding against defects in couplings not patent to visual inspection would be to uncouple them, take them apart, and operate them separately, a method that would be practically out of the question, as the evidence shews. Unless juries are to be permitted to lay down new methods of conducting such enterprises as that of the defendant, as to the operations and necessities of which they necessarily cannot be fully informed, then this verdict cannot stand.

It is impossible not to feel the greatest sympathy with the plaintiff in this case, where he has suffered irreparably and where there has been no fault of his own. But to hold the defendant Company liable in the circumstances, I submit, would be contrary to our established jurisprudence.

It was also contended for the defence that, an accident of this kind, due to an exceptional and

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wholly unexpected occurrence, where it cannot be found that there was a lack of proper care in guarding against it, gives rise to no liability. This contention is based on *Rostrum v. C.N.R.*, 22 M.R. 250; *Readhead v. Midland Ry. Co.*, L.R. 4 Q.B. 379; *Ferguson v. C.P.R.*, 12 O.W.R. 943, and *Richardson v. G.E.R. Co.*, 1 C.P.D. 342.

In the view I have taken, however, of the contention that the defendant Company had complied with its responsibilities as to supplying the proper appliances and making inspection thereof, it is not necessary to deal with this point.

Though the accident in question took place in Saskatchewan, this case has been conducted throughout as if it had occurred in this Province.

I have read the judgment prepared by Mr. Justice Perdue, and agree with the disposition of the case made by him.

HAGGART, J.A., concurred with Perdue, J.A., and Cameron, J.A.

*Appeal allowed.*



## MONDOR V. TACHE.

Before METCALFE, J.

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*Municipality—Drainage—Negligent construction of ditch—Damage by flooding plaintiff's land.*

Although a municipal corporation, charged with the development of the country, the grading of roads and the digging of ditches for drainage purposes, should receive great consideration in the matter of liability for damages caused by the works, yet it should exercise care in the doing of its work; and, if it begins to dig a ditch at the wrong end, bringing water to a point where there is no outlet, and lets that water lie there for an unreasonable time, whereby more water is brought on to the plaintiff's farm than there would have been if the work had not been done, and the plaintiff suffers damage in consequence, the municipality will be liable therefor.

DECIDED: 23rd May, 1913.

THE defendant was a Rural Municipality. The plain- Statement.  
tiff, a farmer living within the municipality, sued the defendant for that the defendant did negligently and wilfully construct a ditch, in consequence of which water flowed upon the plaintiff's lands causing damage to the lands and to the plaintiff's crops.

*W. F. Hull and J. Mondor* for plaintiff.

*H. P. Blackwood and A. Bernier* for defendants.

METCALFE, J. The plaintiff owns and farms the south-east quarter of section 12, township 9, in range 6 east of the Principal Meridian in the Province of Manitoba. The country in the immediate vicinity appears to be flat prairie land, having no deep water courses; but there seems to be a general tendency for the water to flow north-westerly, in some places over the prairie on the lower levels, and in some places in swales and small runways.

The plaintiff has been on the land for about ten years. Prior to that time there appear to have existed some old ditches dug for local drainage purposes on the quarter section east of his farm, and which ran to a point opposite his land about midway between his north and south lines. At this point on the plaintiff's land, water used, in the spring time, to lie; but in the year 1905 the plaintiff

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himself constructed a ditch from that point westerly to a swale which crossed his farm in a northwesterly direction, and from that time onward the plaintiff says he suffered no damage from water lying on his farm until after the ditch was constructed by the municipality.

The swale running across the plaintiff's farm appears to have come from section 6 in township 9, range 7 east, to have extended northerly across the north-east quarter of section 1 and thence onward in a north-westerly direction.

On the 25th May, 1909, the plaintiff and some 19 others presented the following petition to the Councillors: "We the following petitioners petition your honorable body to grant a ditch to draw about 18 inches of water, said ditch to commence at the north-west corner of section 7 — 9 — 7 East, running south about one mile and a half. Said ditch would require about three culverts." It appears that at the north end of this proposed ditch it would empty into a well-defined waterway which would carry off the water.

The inspector of works for the municipality inspected the locality and on the 19th of June, 1909, reported that the work should be done. Thereafter tenders were called for in the usual way and the work was let to individuals who, instead of commencing the ditch at the north end where it would have an outlet, commenced it at the south end, and did not continue it through to the point of outlet. The plaintiff says that it tapped the swale running north-westerly across his farm at a point further south and brought water onto a part of his farm where it would not otherwise have flowed, and that it also collected water from the low spot and damaged his crop.

In the following year he, with some others, wrote the Councillors, calling their attention to the urgent necessity of completing the ditch, notifying the Council that it was causing considerable damage and stating that they

did not feel inclined to sustain any further damage. In 1911 the municipality actually did complete the ditch, and the plaintiff says that thereafter he suffered no damage from water.

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I am inclined to the view that, before the south end of the ditch was constructed, while a large quantity of the water from section 6 did flow through the swale running north-westerly across the plaintiff's land, a considerable quantity also flowed north-westerly across the quarter section to the east of the plaintiff's land and lodged about the place where the ditch privately constructed, before mentioned, crossed into the plaintiff's land. I have no doubt that in the years 1910 and 1911 a considerable quantity of water lodged upon the plaintiff's land, but I do not think that it is all, or nearly all, attributable to the ditch then constructed by the municipality.

However, I think that more water was brought upon the easterly part of the plaintiff's land than would have come there had the ditch not been constructed. I think that some portion of the damage caused may quite reasonably be charged to the construction of this ditch.

Was it negligently constructed? It may be said that a municipal corporation, charged with the development of the country, with the grading of roads and the digging of ditches, should receive great consideration in the matter of liability consequent thereon.

It is necessary for the development of the country that roads should be constructed and ditches should be dug, and to establish as a principle that the municipality is liable for such consequences might unreasonably retard municipal works. This of course does not apply to larger matters where the provisions of the Municipal Act protect the municipality, but does apply to smaller and minor matters.

However, it does seem to me that a municipality must exercise some care in the doing of its work, and if it be

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gins to dig a ditch at the wrong end, bringing water to a point where there is no outlet, and lets that water lie there for an unreasonable time, it must be held that it is guilty of negligence of the grossest kind and it must pay for such negligence.

Although I have arrived at the conclusion that the plaintiff has established a case against the municipality, I have great difficulty in assessing the damage. The plaintiff has sworn to large damage. I think, however, that he will be sufficiently compensated on a considerably lower basis than his own estimate. It is impossible for me to say to a nicety how much of the damage was caused by the action of the municipality. I believe, however, that the plaintiff's damage was considerable and, exercising the best judgment that I can under the circumstances, I find for the plaintiff for \$500 and costs upon the King's Bench scale.

This case was tried before me in December last; and although I reached the above conclusions immediately after the trial and extended my notes of judgment, the delivery thereof, for reasons obvious to counsel, and counsel assenting thereto, has been delayed until this date.

Mr. Blackwood recently made an application to introduce evidence that since the trial the plaintiff has been damaged by water notwithstanding the outlet to the north. I refuse to re-open the case.

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## SPENCER V. SPENCER.

Before CURRAN, J.

*Statute of Frauds—Collateral verbal agreement—Conveyance of land in consideration of promise by grantee to support grantor's son for life—Remedy in case grantee refuses to carry out promise—Vendor's lien—Agreement not to be performed within a year—Express trust—Annuity—Charge on land—Parol evidence—Fraud.*

According to the trial Judge's findings of fact, plaintiff purchased and had conveyed to the defendant, one of his sons, a house in Winnipeg in consideration of the verbal promise of the defendant that he would thereafter keep and maintain for the rest of his life a brother who was mentally deficient, incapable of doing anything for himself, and who was wholly a charge upon the father's bounty. The defendant then took charge of the brother; but, after a few months, refused any longer to do so and the plaintiff had to make other arrangements for him.

*Held*, (1) The defendant's promise was not a contract for sale of lands or of any interest in or concerning lands, but was a collateral agreement which might be proved by parol evidence and which was not within the 4th section of the Statute of Frauds.

*Smith v. Ernst*, (1912) 22 M.R. 363, and *Morgan v. Griffith*, (1871) L.R. 6 Ex. 70, followed.

(2) The defendant's agreement was not within that part of the 4th section relating to agreements not to be performed within one year, because it would not necessarily, by its terms, endure beyond a year.

*Slater v. Smith*, (1853) 10 U.C.R. 630, and *McGregor v. McGregor*, (1888) 21 Q.B.D. 424, followed.

(3) Even if the defendant's agreement was within the statute, as the consideration for it had been completely executed by the plaintiff, the Court would, under the circumstances, enforce the contract notwithstanding the statute.

*Halleran v. Moon*, (1881) 28 Gr. 319, and *Kinsey v. National Trust*, (1904) 15 M.R. 32, followed.

(4) If it could be held that the transaction amounted to the creation of an express trust on which the defendant was to hold the land, the 7th section of the Statute of Frauds could not be invoked to enable the defendant to perpetrate a fraud by keeping the land and refusing to perform the trust.

*In re Duke of Marlborough*, (1894) 2 Ch. 133; *Smith v. Ernst*, (1912) 22 M.R. at pp. 377, 378, and *Gordon v. Handford*, (1906) 16 M.R. 292, followed.

(5) The plaintiff was entitled to a vendor's lien on the house for the amount he had paid for it, less such sum as the defendant should be allowed for the support and maintenance of the brother during the time he resided with the defendant, such amount to be ascertained on a reference to the Master agreed if not upon.

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*Cunningham v. Moore*, (1895) 1 N.B.Eq. 116, and *Paine v. Chapman*, (1857) 6 Gr. 338, followed.

(6) When A conveys land to B in consideration of B's agreement, to pay an annuity to C, the Court will, upon default in payment, declare the annuity to be charged upon the land, although no express charge has been created, and decree a sale of the land to realize the charge.

*Dawson v. Dawson*, (1911) 23 O.L.R. 1, followed.

*Zdan v. Hruden*, (1912) 22 M.R. 387, explained.

Judgment for payment by defendant of the balance to be found due and for sale of the land if not paid with all costs within a month thereafter.

DECIDED: 2nd June, 1913.

Statement. THIS action was brought by the plaintiff to recover house property conveyed to his son, on the ground that the consideration that the son should provide his brother with a home and board and lodging had not been carried out.

*W. H. Trueman* for plaintiff.

*F. M. Burbidge* for defendant.

CURRAN, J. This action arises out of one of those unfortunate family disputes about property, which, in my opinion, had better have been settled out of Court. However, the parties cannot agree to do this, and I must decide the controversy as best I can.

The evidence is conflicting and, as the parties are apparently of good reputation, I find some difficulty in coming to a conclusion upon the facts.

The plaintiffs are father and son, the former an old man nearly 80 years of age, and the latter a man of some 48 years of age, but mentally deficient and weak, incapable of doing anything for himself, and wholly a charge upon his father's bounty. The defendant is another son, 43 years of age, married and residing in Winnipeg. The father resides at Bracebridge, Ontario, where he has held the position of Police Magistrate for the District of Muskoka for the past 25 years. He is, I understand, a widower and has living four sons, John,

Robert, the plaintiff James, and the defendant, and one daughter, Isabella, the wife of William Kirby of Bracebridge. It is necessary that these particulars of the family should be stated in view of the defendant's contentions.

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The plaintiffs seek to recover in this action from the defendant a certain house property in Winnipeg on Home Street, described as Lot 35 and the most northerly 33 feet in width of Lot 34 in Block 14, subdivision of part of Parish Lot 66 St. James, according to registered plan of the Winnipeg Land Titles Office, No. 279.

This property the plaintiff William H. Spencer purchased in July, 1911, from a Mrs. Myers, and caused to be conveyed to the defendant, as the plaintiff alleges, in consideration that the defendant would provide the son James with a home and board and lodging and would care for and maintain the said James at the defendant's home during the lifetime of the said James.

The father's evidence is somewhat at variance with the allegations in the second paragraph of the statement of claim, in which the consideration for the support and maintenance of the son James is alleged to be the purchase of the house and lots on Home Street, and a devise to the defendant by the father's will of two certain properties, consisting of lands and houses in Bracebridge, Ontario. The father stated positively at the trial that the devise by will, which in fact was subsequently made, was entirely independent of and in no way connected with the agreement for the son's support.

The defendant, on the other hand, denies most positively the father's allegations, and says that the conveyance to him of the Winnipeg property was not made in consideration of, or in any way connected with, the arrangement for the support of his brother James; but was in fact made to him as a gift, and for the purpose of putting him upon a footing of equality with his brothers

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and sister, inasmuch as the father had theretofore failed to make any provision for him out of his estate which apparently had been done for his brothers John and Robert and his sister Isabella. The defendant alleges that he agreed to take and keep James in consideration of provision to be made for him by his father's will, consisting of a devise of two house properties in Bracebridge, worth about \$3,000, a small amount of life insurance, and such other property as the father might die possessed of. Here, again, there is a variance between the defendant's evidence and the allegations in clause 6 of his statement of defence, in which it is alleged that the defendant received and took his brother James from a brotherly feeling and not in pursuance of any agreement between himself and either or both of the plaintiffs.

How these errors in pleading came about I do not know, but I assume that it was in consequence of the solicitors misunderstanding the facts. As there is a variance on both sides of the record, I will treat the pleadings as if they conformed to the evidence in these respects.

It is admitted that the plaintiff James is mentally weak and wholly unable to care or provide for himself and that, latterly and up to the month of July, 1911, the father had provided a home for him with his daughter Isabella at Bracebridge. It also appears that Isabella's husband objected to keeping James any longer, and it became necessary for the father to make other arrangements for a home for his unfortunate son. With this object in view the father came to Winnipeg in June or July, 1911, and visited the defendant, and sought to make arrangements with him for the support of his brother James.

To more fully appreciate the defendant's contention, it is necessary to advert to some of the earlier family history. The defendant, prior to coming to Manitoba, had remained at home working with his father on his farm for



some 27 years. The father possessed two farms, one known as the homestead comprising about 300 acres, and the other in the vicinity comprising some 200 acres. When the defendant came of age the 200 acre farm was conveyed to him by his father. After holding it for a short time, he says that, at his father's request and upon the faith of his father's promise to give him the homestead, he conveyed the 200 acre farm to his brother John, but did not get the homestead as promised. This alleged breach of faith on the part of the father engendered a spirit of unfriendliness between the father and the defendant. The defendant left home about 15 years ago and ultimately came to Manitoba. When leaving home he says that his father again promised to leave him the homestead when he was through with it, as he expressed it. About a year after coming to Manitoba he received offers by letter from his father to return to Ontario and live with him on the farm. This he declined to do. At this time his brother Robert was also out in this country. The defendant gives as his reason for not going back to the farm that he could not depend upon his father's promise to leave it to him, and he accordingly wrote a letter to his father offering to take \$500 in cash and give up his claim to the homestead, at the same time suggesting that his brother Robert should return to Ontario and take the land. The father replied that he owed the defendant nothing and the matter dropped. Subsequently Robert returned to Ontario and got a deed of the homestead from his father, for which the father says he paid him \$1,000. This included about \$1,000 worth of stock and farm implements, and the defendant says the money so paid was for the stock and farm implements and not for the land; but this the father does not admit to be the case.

The daughter Isabella was also provided for by her father giving her a boarding house property in Bracebridge, but coupled with a verbal condition that she was

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to provide a home for him as long as he lived. Apparently the defendant then had received no assistance from his father except about \$150 given him at different times. The father frankly stated in his evidence that he intended the homestead for the defendant from his early days, and told him so long before he went West, and I think I am justified in inferring that, as the defendant refused to return to Ontario and live on the homestead, the father felt morally justified in giving the land to his son Robert, who was willing to do so.

In October, 1908, the plaintiff made his will, by which a legacy of \$500 was bequeathed to the defendant and the landed property in Bracebridge was devised to his daughter Isabella, subject to the support and maintenance of the son James "during the remainder of his natural life and to his burial after death, said maintenance and support being a charge on his said real estate." The will contained a residuary devise in favor of Isabella.

This, then, was the position of matters when the plaintiff W. H. Spencer came to Winnipeg; the son John had been given the 200 acre farm, the son Robert the homestead, stock and implements, for which he paid \$1,000, the daughter Isabella the boarding house property in Bracebridge, and the defendant about \$150 in money, and there were the testamentary provisions just stated.

Although the defendant and his father were estranged, they appear to have corresponded occasionally, and on November 29th, 1908, the father wrote the defendant the letter Exhibit 11. The proposition contained in this letter was refused by the defendant. Again on December 21, 1908, the father wrote the defendant the letter Exhibit 17, asking him to take charge of James and making proposals to that end. The defendant again declined, and nothing further transpired between them until the plaintiff W. H. Spencer came to Winnipeg as before stated.

When discussing the matter with the defendant in Winnipeg, the plaintiff W. H. Spencer admits that the defendant reminded him that he had done more for the other members of the family than for him, and that before he would speak of keeping James he wanted the plaintiff, as he expressed it, to put him equal with the others. Now this is just what the defendant says took place; but the parties differ as to what followed.

The plaintiff says the defendant answered his proposals for keeping James by saying that the other members of the family were better able to keep him than he was, to which the plaintiff replied that he did not propose to put him (James) out as a pauper, but would pay for him, at the same time suggesting an investment in a house or the purchase of a Government annuity. He further says he asked defendant whether he would sooner have the house on Home Street or the price of it, to which the defendant replied that he would rather have the house. The plaintiff states he then said to the defendant "I will give you a clear deed of that house if you will take James for his natural life." To which he says the defendant assented. The next day they completed the purchase of the house on Home Street, for which the plaintiff paid \$3,250 in cash, \$1,000 of which he had previously borrowed from his bankers in Ontario, and the title was vested in the defendant clear of incumbrance.

It appears that before buying the house the plaintiff gave the defendant \$500 saying that he had promised him this sum in his will and that he should have it in any event; but he swears positively that this gift of money to the defendant had nothing whatever to do with the arrangement subsequently made for the support of James. This money was given to the defendant while the father was in Winnipeg. It was stipulated, the plaintiff W. H. Spencer says, that the defendant should return with him to Ontario and bring James back to

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Winnipeg and this was done. The plaintiff W. H. Spencer further says that after the purchase of the house, and before leaving for the East, he told the defendant that he would, in addition to giving him the house, leave him by his will all the property he died possessed of.

While in Bracebridge the plaintiff W. H. Spencer made an alteration in his will in apparent fulfilment of this promise. Exhibit 1 is a copy of the will and codicil, and has endorsed at the foot a memorandum of the changes to be made. The original will was not produced at the trial, but Exhibit 1 is a copy in the plaintiff's handwriting and was made and given to the defendant at Bracebridge and by him produced at the trial. A reference to this document discloses that the bequest of \$500 to the defendant is to be revoked, the money having been paid. The other bequests in clause 3 are also to be revoked, as also is the devise to Isabella in clause 4, and a general devise to the defendant is to be added of all the testator's real and personal property, including insurance moneys, subject to the support and maintenance of his son James "during the remainder of his natural life and to his burial after death, said maintenance and support being a charge on said real estate." There is no date to this memorandum, but it was made some time in August, 1911, and before the defendant returned to Winnipeg with James.

The to me peculiar thing about this is that the devise is made subject to the support of James, when, according to the plaintiff's story, this matter had been finally completed and arranged for in Winnipeg by the purchase of the house on Home Street, and, from what the plaintiff said to the defendant while in Winnipeg about providing for him by will, I would have concluded that such provision was to be for the defendant's own benefit untrammelled by any charge or condition. But the plaintiff says later on in his evidence: "the change in my will had nothing to do with the bargain made in Winnipeg for the

keep of James; it was purely voluntary on my part and additional." I find difficulty in reconciling these positive statements with the language used in the will, and I am strongly inclined to think that the true consideration for the support of James was the Winnipeg property plus the provisions contained in the will. If not, it was apparently a mistake to incumber the devise to the defendant by conditions for the support of James.

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The plaintiff further says that the defendant, while in Bracebridge, wanted a deed of the Bracebridge properties, because he expressed a fear about his father changing his mind and altering his will. This the plaintiff refused to give, and apparently the defendant was contented to accept the provision as made in the altered will, and returned to Winnipeg with James, who continued to live with him until about the 6th of November, 1912, when he refused to keep him any further in his house, or to further support him. The father then arranged that Robert should take the son James to his home, and ultimately he was sent back to Ontario and is again a charge upon his father's bounty.

The defendant says most positively that he refused to treat with his father at all for the support of James until he had been put upon a footing of equality with his brothers and sister with regard to the benefactions they had previously received from the parental estate, and that the father acquiesced in this, and that the \$500 in money and the Home Street house were given to the defendant for this purpose and no other. He swears that, when this had been done, and not before, the arrangements to take James were agreed to, in consideration of the provisions in the father's will before referred to.

I cannot accept the defendant's evidence that this was the agreement with the father. To my mind it is wholly unreasonable and inconsistent with the previous attitude

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of distrust exhibited by the defendant towards his father. The provision by will, even if unalterable, had been previously offered and refused, and would not take effect in any event until the father's death and would not produce the defendant any material benefit until that event happened; the defendant was, by the terms of the agreement, as he alleges it, incurring a present and continuing burden and responsibility in taking his brother into his home, caring for him and providing for him. I cannot believe that he agreed to do this upon the father's bare word or promise that he would make provision for the defendant by his will, as the consideration for his presently undertaking the support of his brother. It is entirely inconsistent with the defendant's story of his unjust treatment by his father in the past and with his present attitude of distrust towards his father.

On the whole, I think the father's evidence in the light of past events to be the more creditable and I accept it in preference to that of the defendant. Besides which it is corroborated in some material particulars by the son Robert, the daughter Isabella and the solicitor Johnson. It is true the defendant's evidence is also corroborated to some extent by his wife and by the witness Myers. It is only reasonable to assume that the wife would have a natural bias in favor of her husband as well as having a direct interest in retaining the Winnipeg property. The evidence of the witness Myers is not, to my mind, conclusive and, even accepting it as given, would not exclude the possibility of the father having made the arrangement with the defendant which he swears to.

Upon the whole, I think the weight of evidence is in favor of the plaintiff's contention. I think the father was moved to make the sacrifice he did in purchasing the house in Winnipeg solely for the purpose of making an immediate and permanent provision for his helpless son. I am satisfied that he felt his own life was drawing to a

close and it was worrying him to think what might happen to his son after his demise if he left him unprovided for. He knew that his daughter Isabella, owing to objections of her husband, was no longer willing to afford him a home, and I think these considerations and a sense of his duty as a father moved him to make the arrangements in the way in which he says they were made, and I am satisfied that the defendant was agreeable to accept the property on Home Street as the consideration for his engagement to support and maintain his brother for the remainder of his life.

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In consequence of the defendant's refusal to keep his brother, the father now finds himself in the position of having to provide for his son with less than half the means of doing so which he had when he came to Winnipeg and made the arrangement with the defendant. I am satisfied that such a contingency was never in the contemplation of either of the parties.

It may be that the arrangement was an unfortunate one in the first place, and that Winnipeg was not a suitable place for this unfortunate man to be kept, and I entirely agree with what the defendant says upon this point, and that a farm would be much preferable for him as a home. But both the defendant and his wife were fully aware in advance of the nature of the responsibility they were incurring. They cannot and do not plead ignorance upon this point, and I think they must be held strictly to their bargain. As they cannot be forced to keep the man in their home, they should give up the consideration which they received from the father for this purpose, and thereby place the father in as good a position financially as he was in before the bargain was made.

My findings upon the facts being adverse to the defendant's contention, all the grounds of defence except one must of necessity fail. The defendant has, however, pleaded the Statute of Frauds as a bar to the plaintiff's



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The only sections of the statute that can apply are the 4th and 7th. In my opinion neither of these sections affects the plaintiff's position. The defendant's promise to support James was not a contract or sale of lands, etc., or any interest in or concerning them; but was, I think, a collateral agreement only, which might be proved by parol evidence, and which is not within the 4th section of the statute. The defendant agreed that, in consideration of the conveyance of the land to him, he would support and maintain the plaintiff James Spencer for the remainder of his natural life. This promise was only connected with the land as constituting the consideration for its conveyance to the defendant. It in effect represented the purchase price of the land, and the plaintiff W. H. Spencer is really in the position of an unpaid vendor who has a lien upon the land for his unpaid purchase money.

As to the promise being collateral, I refer to *Smith v. Ernst*, 22 M.R. 363; *Morgan v. Griffith*, L.R. 6 Ex. 70. In the latter case there was a lease of grass land executed by the plaintiff (tenant) on the strength of a parol agreement by the defendant (landlord) to destroy the rabbits infesting the land. The defendant failed to fulfil his promise and the plaintiff brought an action for damage done the grass and crops on the land demised by the rabbits. The Statute of Frauds was pleaded, but the Court held that the parol agreement was collateral to the written lease and that evidence of it was properly received and the plaintiff entitled to recover.

Again the agreement of the defendant is not, I think, within that part of the 4th section relating to agreements not to be performed within the space of a year, because by its terms it would not necessarily endure beyond a year: *Slater v. Smith*, 10 U.C.R. 630. Robinson, C.J.,



at p. 633, says: "To bring the case within the statute it seems to be held that the very terms of the agreement must carry it beyond a year. It is not sufficient that the agreement may cover or extend to a period beyond the year, depending on some uncertain contingency." See also *McGregor v. McGregor*, 21 Q.B.D. 424.

Even if the promise or agreement of the defendant is within the statute, the consideration for it has been completely executed by the plaintiff W. H. Spencer, and the Court will, under such circumstances, enforce the contract, notwithstanding the statute: *Halleran v. Moon*, 28 Gr. 319; *Kinsey v. National Trust*, 15 M.R. 32.

Again, if it could be held that the transaction between the plaintiff W. H. Spencer and the defendant amounted to the creation of an express trust on which the defendant was to hold the land, the 7th section of the statute could not be invoked to enable the defendant to perpetrate a fraud by keeping the land and refusing to perform the trust: *In re Duke of Marlborough, Davis v. Whitehead*, [1894] 2 Ch. 292; *Smith v. Ernst*, 22 M.R. at pp. 377, 378; *Gordon v. Handford*, 16 M.R. 292. The statute was not made to cover fraud: *Lincoln v. Wright*, 4 De G. & J. 16.

However, I prefer to rest my judgment rather upon the ground of relief afforded by the view I take that the plaintiff W. H. Spencer has a vendor's lien as for unpaid purchase money. The case of *Cunningham v. Moore*, 1 N.B.Eq. 116, is a clear authority for this proposition. In that case a farm was conveyed by an aged couple to their daughter and on the same day she, the daughter, and her husband entered into a written agreement with the vendors to board them on the farm and pay them an annuity in consideration of the conveyance of the farm. It was held that the vendors had a lien on the land for the performance of the agreement. Barker, J., says at p. 118:

"It is a well settled principle that the vendor of real

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estate has a lien on the land for the purchase money unless there is some agreement, express or implied, that he shall not have. The performance of this agreement represents the purchase money and, unless the circumstances negative the intention to preserve the lien, I must hold that it exists."

*Paine v. Chapman*, 6 Gr. 338, is another authority to the same effect. There a conveyance of her estate was made by an aged woman to her grandson for which he was to maintain her. The grandson gave her a bond to secure the consideration and entered into possession of the land. Spragge, V.C., at p. 341, in speaking generally of such arrangements, says:

"I cannot see that such an arrangement affords any indication of an agreement between the parties to it that the aged grantor should trust to the personal engagement, in whatever form, of the grantee for his support at a time of life when he has become incapable of supporting himself. I think rather that he would be considered, not by lawyers only but popularly, as having a claim upon the land for his support. The grantee must show the agreement to be of such a nature that the retention of the lien would be contrary to what appears to have been the agreement of the parties."

I may say here that I cannot find anything in the verbal arrangement between the father and the defendant inconsistent with the existence of this lien.

I refer also to *Dawson v. Dawson*, 23 O.L.R. 1, as a very recent authority for the proposition that the Court will declare a charge upon land for an annuity and a sale of the land in default of payment, upon the principle that, where substantially the sole purpose of a covenant was to secure a benefit for the person named therein, although not a party to the agreement, a trust may well be created, although there be an absence of any expression in terms importing confidence.

The defendant cited the case of *Zdan v. Hruden*, 22 M.R. 387, as being a direct authority against the plain-

tiff's right to a lien or charge upon the land in question, and, if this is what that case in part really decides, I am bound by it notwithstanding the previous authorities to which I have referred. The only part of the judgment of the Court of Appeal dealing with the question of lien is to be found at the end, and is in these words: "In my opinion no lien on the defendant's property can be established," and the trial Judge's finding was reversed upon this point.

I confess I could not altogether understand upon what legal principle this decision was based, and so sought light upon the matter from the Judges of the Court of Appeal. It then transpired that the report of the case did not very correctly set out the facts. I am told by the Judges in Appeal that there were practically two transactions involved in this case, one affecting the land only and a subsequent one relating solely to the chattel property. The consideration for the land was the assumption and payment by the grantee of the vendor's debts, which was carried out in full, thereby putting it out of the question that any vendor's lien could exist or arise in that connection. That, on a subsequent sale of the chattel property between these parties, the agreement to support the plaintiff and his wife was made, and that such agreement had reference solely to the chattels and not to the land. Under these circumstances the Court decided that no lien upon the land, which had been fully paid for, could be established.

It will readily appear, in view of this explanation, that this case is no real authority against a lien being established in the case at bar. I may say that the learned Judges of the Court of Appeal, upon consideration, requested me to make the foregoing explanation regarding the *Zdan v. Hruden* judgment so that it may not be hereafter misunderstood as an authority upon this question.

I hold, therefore, that the lands in Winnipeg on Home Street were purchased and paid for by the plaintiff W.

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H. Spencer and conveyed to and accepted by the defendant upon the consideration that the defendant would support and maintain the plaintiff James Spencer for and during the remainder of his natural life. That this consideration the defendants wholly failed to perform, and the plaintiff W. H. Spencer is thereby in the position of an unpaid vendor entitled to a lien on the property conveyed.

The plaintiff W. H. Spencer is entitled to judgment, and there will be judgment accordingly, declaring that he has a lien on the lands in question on Home Street in the City of Winnipeg for the amount of the purchase money paid by him for the said lands, less such sum as the defendant may be entitled to for the support and maintenance of the plaintiff James Spencer during the time he resided with the defendant.

If the parties cannot agree as to what will be a fair reduction on this account, there will be a reference to the Master to ascertain and fix an amount proper for this purpose.

The defendant will repay to the plaintiff W. H. Spencer the balance of purchase money found to be due after such deduction has been made and, in default of payment within one month from such ascertainment, the lands may be sold under the direction of this Court to satisfy such amount, together with the costs of this action and costs of sale and subsequent costs, if any. The defendant must pay the costs of this suit.

I think the action had better be dismissed as to the plaintiff James Spencer, but without costs, as it may hereafter embarrass the plaintiff W. H. Spencer in working out his judgment if this party remains upon the record as a party plaintiff. There is no necessity for including him in the benefits of this judgment, and it may cause difficulty hereafter, as apparently he is mentally incapable of transacting business of any kind.

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## COURT OF APPEAL.

## RE MANITOBA COMMISSION CO.

Before HOWELL, C.J.A., PERDUE and CAMERON, J.J.A.

*Winding up of Company—Second application for—Res judicata—Creditor's right to order—Evidence—Insolvency—Winding up Act, R.S.C 1906, c. 144, s. 3.*

- (1) The dismissal of a former application for an order to wind up a company under The Winding Up Act, R.S.C., 1906, c. 144, for want of sufficient material, is no bar to a subsequent application for an order by other creditors upon fresh material.
- (2) When the company is insolvent an unpaid creditor is entitled to a winding up order as a matter of right: *In re Chapel House Colliery Co.*, (1883) 24 Ch. D. 259, if it is shown that there are any assets to be administered: *Re Georgian Bay, &c., Co.*, (1889) 29 O.R. 358.
- (3) Proof of an unsatisfied judgment against the company and that it had called a meeting of its creditors, at which the manager stated that the company was unable to pay its debts and offered to compound with the creditors, is sufficient evidence of insolvency, under section 3 of the Act, to warrant the making of the order.

DECIDED: 22nd April, 1913.

APPLICATION to wind up the above company on the Statement. ground that it was insolvent.

The following judgment on the hearing of the application was delivered by

MACDONALD, J. This is an application by the National Elevator Company, Limited, and the Atlas Elevator Company, Limited, to wind up The Manitoba Commission Company, Limited, on the ground that the company is insolvent.

The history of the Company and the facts relating to it are fully recited in the judgment of the learned Chief Justice of this Court, reported in 22 M.R. 268.

A similar application was made before the Chief Justice and dismissed on the ground that the material submitted did not justify a winding up order.

Objection is taken on behalf of the Company that, this being a second application, it cannot be considered, as the matter is *res judicata*.

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Although the petition is for a similar purpose as the one dismissed, the applicants are not the same, nor yet is the material.

As a general rule an unpaid creditor of a Company is entitled to a winding up order *ex debito justitiae*, but that rule is subject to exceptions. It will not be granted where there are no assets and the petitioning creditor would get nothing by the order. If, however, there is anything, and it is impossible to say if of any value, the order should be granted: *Re Georgian Bay Ship Canal Co.*, 29 O.R. 358.

The order is the means of having the assets of a Company applied in payment of its debts, and therefore a creditor generally, where the Company is insolvent, is entitled to the order as a matter of right: *In re Chapel House Co.*, 24 Ch.D. 259.

Under the Winding up Act, R.S.C. 1906, c. 144, a Company is deemed insolvent:

- (a) If it is unable to pay its debts as they become due;
- (b) If it calls a meeting of its creditors for the purpose of compounding with them;
- (c) If it exhibits a statement showing its inability to meet its liabilities;
- (d) If it has otherwise acknowledged its insolvency.

For the purpose of this application these are sufficient grounds for consideration:

- (a) The Company was indebted to the petitioners the National Elevator Company and was unable to pay them, and action was brought and judgment recovered against the said Manitoba Commission Company in the County Court of Winnipeg to the amount of \$499.85, on the 3rd October, 1912. Upon the judgment execution issued, under which the bailiff of the said County Court did seize and levy upon and take in execution some of the goods, chattels and property of the said Company.

H. S. Paterson, the Manager of the Company, in proposing the application for a winding-up order, files an affidavit in which he deposes that this judgment was paid, and the execution issued thereon satisfied. The truth of this statement is denied by Jacob Hall Holman, the Bailiff of the County Court of Winnipeg, who, by affidavit, sworn to herein, says that it is not true the judgment referred to has been paid and the execution issued thereon satisfied, that certain moneys were realized under the said execution but that, at the time, a writ of attachment was in his hands against the goods of the said Manitoba Commission Company at the suit of the Atlas Elevator Company, Limited; and the moneys realized under the execution of the National Elevator Company, Limited, were held for distribution under the provisions of the County Courts Act respecting executions against traders.

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It appears plain to me, therefore, that the Company is deemed to be insolvent in being unable to pay its debts as they become due.

(b) It also appears that on or about the 2nd November, 1911, the Company called a meeting of its creditors for that day at 3.00 p.m. in the Council Chamber, and a notice was sent to the petitioners, the Atlas Elevator Company, requesting them to have representatives meet with creditors at that meeting. Mr. Douglas Laird, Secretary-Treasurer of the Atlas Elevator Company, attended on behalf of that Company and at that meeting Mr. Paterson, Manager of the Manitoba Commission Company, stated that his Company was unable to pay its debts and he offered to compound with its creditors at sixty-five cents on the dollar. This, I take it, is a sufficient acknowledgement of the Company's insolvency and of the object of the meeting being for the purpose of compounding with its creditors.

From the evidence before me, it is plain that the

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petition for winding up is amply verified, and grounds sufficiently established to entitle the petitioners to a declaration in conformity with the prayer of their petition, and to a winding up order, and there will be an order accordingly.

The Company appealed.

R. D. Guy for appellants.

W. H. Curle for the respondents was not called on.

THE COURT dismissed the appeal.

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### THE SCANDINAVIAN AMERICAN NATIONAL BANK

V.

KNEELAND.

Before CURRAN, J.

*Security for costs—Application for additional security—Amendment—Practice—Costs—Trial, re-opening of.*

At the opening of the trial, defendant applied for an order that the plaintiff do furnish additional security for the costs of the action on an affidavit showing that the costs so far incurred far exceeded the amount paid into Court (\$200) by the plaintiff under præcipe order.

The trial Judge reserved his decision on the application till after the trial.

At the close of the case the plaintiff asked leave to amend the statement of claim by introducing new matter to which the defendant might wish to plead and upon which evidence might be required.

The Judge reserved his decision upon this motion also, and, afterwards, without giving judgment in the action,

*Held*, (1) The plaintiff should furnish additional security for costs to the amount of \$400, if paid into Court, or by bond for \$800.

(2) The plaintiff should have leave to make the amendment asked for, as it appeared to be necessary in determining the real question or issues between the parties, and would occasion no injury or prejudice to the defendant for which costs would not compensate him.  
*Lee v. Gallagher*, (1905) 15 M.R. 677, followed.

Defendant to have the usual time to file his defence to the amended statement of claim.

The trial to be re-opened, if necessary, to hear any evidence bearing upon the new issue raised by the amendment and any defence thereto. All costs occasioned to the defendant by reason of the amendment to be costs in the cause to the defendant in any event.

DECIDED: 29th April, 1913.



At the opening of this case the defendant made an application for an order for additional security for costs against the plaintiff and filed an affidavit showing the amount of disbursements so far incurred, and also the amount of the costs in the action up to this point exclusive of certain counsel fees.

*O. H. Clark, K.C., and P. A. Macdonald* for plaintiff.

*H. Phillipps and C. S. A. Rogers* for defendant.

CURRAN, J. I reserved the matter for consideration and proceeded with the trial, which lasted some days. At the close of the case the plaintiff asked leave to amend clause 9 of the statement of claim by alleging that the plaintiffs had, in consideration of the payments therein referred to by H. H. Berge, discharged him from his liability under the contract of guaranty in question.

This amendment would seem to be necessary in view of the provisions of a statute of the State of Minnesota, known as Article 4283 of the revised laws of Minnesota, 1905, relating to discharge of joint debtors. The amendment was strongly opposed by the defendant, and I reserved this matter also and intimated to counsel that I would announce my decision upon both applications before giving judgment in the action. I have now given both matters careful consideration, and I have come to the conclusion that I ought to make an order requiring the plaintiff to give additional security for costs. A *præcipe* order for security for costs was obtained by the defendant, and in compliance therewith the plaintiff paid into Court \$200. This amount is not now by any means adequate in view of the amount of costs and disbursements already incurred, as shown by the affidavit of Mr. Phillipps, and I think it would not be unreasonable, under the circumstances, and considering the length of time occupied in the trial of the action, to require the plaintiff to give additional security to the amount of four

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hundred dollars, if the money is paid into Court, or by bond, if that method is adopted, in the sum of \$800.

I also allow the plaintiff's application for leave to amend. Were I to refuse this, I think I would be acting contrary to the intent and spirit of our rules of Court relating to amendments, and the well established practice of our Courts in that respect. The amendment is in my opinion necessary to determine the real questions or issues raised by the proceedings. No injury or prejudice can be occasioned to the defendant by allowing the amendment that costs will not compensate him for, and I take it this is the test as to whether or not an amendment should be granted: *Lee v. Gallagher*, 15 M.R. 677. The defendant will have the usual time to file his defence to the amended statement of claim, or longer if necessary. The case will be re-opened, if required, to admit further evidence if the parties desire to produce any such, restricted, of course, to the new matter raised by the amendment and defence thereto. All costs occasioned to the defendant by reason of the amendment will be costs in the cause to the defendant in any event of the cause, and costs of the application for additional security for costs will be costs in the cause.

When the amendment hereby allowed has been made and defence thereto, if any, filed, the plaintiff will amend the record accordingly. I will, on application of the parties, or upon two days' notice by one party to the other, fix a date to hear any further evidence and argument occasioned or rendered necessary by the amendment.

There will be a stay of proceedings in the action until the order for additional security for costs has been complied with, and such security must be given within one month from the date of my formal order in that behalf, which order the defendant will take out forthwith.

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## SCHWARTZ V. WINNIPEG ELECTRIC RY. CO.

Before HOWELL, C.J.M., PERDUE and HAGGART, J.J.A.

*Negligence—Street railway—Infant—Damages—Verdict of jury—Excessive damages—Evidence—New Trial—Evidence Act, R.S.M. 1902, c. 57, s. 39.*

The plaintiff, a boy eight and a half years old, suing by his father as next friend, had a verdict for \$8,000 damages in this action which was for an injury resulting in the loss of his right arm below the elbow caused by a street car of the defendants running over him negligently as it was alleged. The verdict was a general one, no questions having been put to the jury, and there was nothing to show upon what act or acts of negligence the jury had based their verdict.

The plaintiff was tendered as a witness but the trial Judge did not think that he understood the nature of an oath and did not permit him to be sworn. He also declined to admit the boy's unsworn testimony under section 39 of the Evidence Act, R.S.M. 1902, c. 57, although some of his answers on the stand indicated that he understood the duty of telling the truth.

There was only one witness called by the plaintiff who actually saw the accident happen, one Taylor, and his evidence differed in material respects from that of the only eye witness called by the defendants, the motorman.

*Held*, that there should be a new trial for the following reasons:—

- (1) Taylor's account of what took place, summarized in the judgment, was far from satisfactorily establishing such a case of negligence against the defendants that a jury would be justified in basing their verdict upon his testimony alone.
- (2) Assuming that the boy had the ordinary intelligence of a child of his age, his own negligence may have been the cause of the accident.
- (3) It would be desirable to have the evidence of the plaintiff himself as to how the accident happened, either under oath or by way of statement under section 39 of the Evidence Act.
- (4) The damages allowed were exceedingly large, if not excessive under the circumstances, as the amount would, if properly invested, taking into account the plaintiff's condition in life, support him for the rest of his life.

In awarding damages the jury ought not to fix such a sum as, if invested, would produce the full amount of income which the plaintiff might be expected to earn if he had not been injured, but ought to take into account the accidents of life and other matters and, in this case, that the plaintiff has not been completely disabled. They should take a reasonable view of the case, and give the plaintiff, not the full amount of a perfect compensation for the pecuniary injury, but only what they consider, under the circumstances, a fair compensation for his loss.

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*Rowley v. London & N.W.R.*, (1873) L.R. 8. Ex. 221, and *Johnston v. G.W.R.*, [1904] 2 K.B. 250, followed.

DECIDED: 14th April, 1913.

**Statement.** THE plaintiff Shay Schwartz sued by his father and next friend to recover damages for injuries caused to him by a street car of the defendants. At the time of the occurrence the boy was about eight and a half years old. While attempting to cross Dufferin Street, Winnipeg, he was struck by the car and knocked down. The front wheels of the car passed over his right arm and below the elbow injuring it in such a manner that it had to be amputated.

The plaintiff set up several charges of negligence: (1) excessive speed of the car; (2) that the gong was not sounded; (3) that the fender of the car was not in proper working order; (4) that the wheels were not sufficiently protected with guards; (5) that the defendants did not have or use proper means of stopping the car promptly; (6) that they had not the car under proper control; (7) that a proper lookout was not kept. The trial Judge allowed the jury to bring in a general verdict which they found in favor of the plaintiff, awarding \$8,000 damages. There was nothing to show upon what act or acts of negligence the jury based their verdict.

Defendants appealed.

*E. Anderson, K.C.*, and *R. D. Guy* for defendant.

*M. J. Finkelstein* and *E. R. Levinson* for plaintiff.

The judgment of the Court was delivered by

PERDUE, J. A. Only two witnesses were called at the trial who actually saw the occurrence of the accident. One of these, the witness Taylor, was called by the plaintiff. The other was the motorman in charge of the car and he gave evidence for the defence. Their accounts of what took place differ in material respects. It was, of course, the right of the jury to believe the evidence of Taylor and, if they thought proper, to disbelieve the motorman.

The plaintiff's case was based upon Taylor's evidence as showing how the accident occurred and as establishing the negligence of the defendants which, it is claimed, was the cause of the plaintiff's injury. I have carefully read the evidence of that witness and I must say that I am far from satisfied that his account of what took place established a case of negligence against the defendants so that a jury would be justified in resting their verdict upon his testimony alone.

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If there is to be a new trial in this case it would not be proper to comment fully upon evidence which would have to be repeated at another trial. It is necessary, however, to point out certain things which influence my mind in coming to the conclusion that there should be a new trial.

It appears that the plaintiff on the night of the injury was engaged with other boys in making a noise outside Taylor's store and annoying him. This was on 9th April at about nine o'clock at night, a time when the boy's parents should have seen that he was at home and in bed. Taylor came out of his store, which was on the north side of Dufferin street, and drove the boys away. They ran west along the sidewalk, jeering him. The plaintiff, according to Taylor, went first with the other boys and then turned across Dufferin street. Taylor's store was the second one west from where Schultz street intersects Dufferin. There is a double line of street car tracks on Dufferin street, the west bound cars running on the north line. The boy started to cross the street from opposite the west window of Taylor's store. The car which caused the injury was travelling west, and Taylor says he first saw it when it was at the east side of Schultz street, which would be about a hundred feet away from where he was standing. The boy was then out on the street about three feet from the sidewalk, and, as Taylor says, about three feet from him. Taylor gives no sufficient explanation why he did not call to the boy to

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look out for the car. When it was about forty feet from the boy Taylor shouted to the motorman and held up his hands to stop the car. At no time did he call to the boy or warn him. It would appear from Taylor's evidence that the boy continued across Dufferin street, in a direction slanting a little to the east, until the car collided with him. Apparently there was nothing to prevent the boy from seeing and hearing the approaching car.

We must take it that the boy had the ordinary intelligence of a child of his years. It must be assumed that a boy of his age would know enough to get out of the way of a moving street car if he saw it coming. The place where the accident occurred was well lighted and there was no difficulty in seeing the approaching car. The lights in the car would also serve to warn anyone of its proximity who took the care to look. The car would certainly be as easily seen by the boy as the boy could be seen by the motorman.

The motorman says that he saw the boy running eastward half-way between the car track and the sidewalk, but looking over his shoulder, that he, the motorman, sounded his gong, that the boy when close to the car suddenly turned and ran in front of it. Taylor and others of the plaintiff's witnesses say they did not hear the gong. Taylor says the car was making the usual noise of a street car. This would give some warning of its approach and, if Taylor heard it, the boy was in a still better position to hear it.

The boy's evidence was tendered, but the learned trial Judge did not think that the boy understood the nature of an oath and did not permit him to be sworn. Even if the trial Judge considered himself justified in so holding, still I am not sure that the boy's unsworn evidence as to what occurred was properly excluded. Some of his answers indicate that he understood the duty of telling the truth. He might have been questioned more fully

as to this, with a view of admitting his statement under section 39 of the Evidence Act, R.S.M. 1902, c. 57. If his evidence had been received it might have thrown light upon some things that are obscure at present. He might have been able to explain why he failed to see the approaching car, and why he continued on his course until it collided with him. Was there something that distracted his attention? Was he running from Taylor with his head turned towards the latter and not looking for any danger in front? I think it would be well to have his statement as to this, either in the form of evidence under oath or in the form of unsworn evidence received under the provision in the Evidence Act.

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I think the damages awarded were, under the circumstances of this case, exceedingly large, if not excessive. The sum of \$8,000 which the jury has allowed in this case would, if properly invested, taking into account the boy's condition in life, support him for the rest of his days. In awarding the damages the jury ought not to give the plaintiff such a sum as, if invested, would produce the full amount of income which he might be expected to earn if he had not been injured, but ought in estimating the damages to take into account the accidents of life and other matters, and to give the plaintiff what they consider, under all the circumstances, a fair compensation for his loss: *Rowley v. London & N.W.R.*, L.R. 8 Ex. 221; *Johnston v. G.W.R.*, [1904] 2 K.B. 250.

The plaintiff has not been completely disabled, although his earning powers have been seriously affected. In assessing the damages in an action like the present, the proper direction to the jury is, "that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation:" per Brett, J., in *Rowley v. London & N.W.R.*, at page 231. It appears

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to me that there must have been some misconception on the part of the jury as to the amount of damages they should allow, and that they sought to give him complete compensation instead of that fair and reasonable compensation which they might award.

Considering the unsatisfactory account of the accident as given by Taylor and the absence of any evidence by the boy, sworn or unsworn, and the very large damages awarded in the circumstances of this case, I think there should be a new trial. The costs of the former trial and of this appeal should be costs in the cause.

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### COURT OF APPEAL.

#### WEST v. MAYLAND.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, JJ.A.

*Trespass—Possession under lease—Execution of lease by Company—  
Lease for grazing purposes—Permit to cut and take hay.*

1. If A has taken possession of land under a lease executed on behalf of a company owning the land by a person describing himself as Land Commissioner of the Company, the validity of his lease cannot be disputed by B, whose only claim is under a permit to cut and take hay signed by the same person on behalf of the company.
2. Under a lease, of which the *habendum* is, "to have and to hold . . . . for grazing purposes only for three years," the lessee is, nevertheless, entitled to peaceable possession and may maintain an action of trespass against one who enters upon the land under a prior permit to cut and take hay which has been legally cancelled.

DECIDED: 9th June, 1913.

**Statement.** COUNTY Court appeal. Action for trespass to land. A verdict was entered for the plaintiff by Judge Ryan, and defendant appealed.

*H. A. Bergman* for defendant, appellant, cited *Woldock v. Robinson*, 24 Atl. Rep. 73; 10 *Halsbury*, 341, sec. 627, and *Marsan v. G.T.P.Ry.*, 4 Alta. 167.

*G. Barrett* for plaintiff, respondent, cited *Rodgers v. Nowill*, 5 C.B. 125.



The judgment of the Court was delivered by

191:

HAGGART, J.A. This is an action for trespass to land. The plaintiff claims title under a lease, pursuant to the Short Forms Act, from the Hudson's Bay Co., dated 30th of March, 1912. The *habendum* is "to have and to hold \* \* \* for grazing purposes only for and during the term of three years." The defendant's title is what is known as a hay permit from the same Company, dated 25th September, 1911, permitting the defendant "to cut and take hay" from the land during the season of 1912, for a consideration of \$6.00, and across the permit is written in red ink these words: "This permit becomes cancelled by the sale or lease of the lands." On the 26th of May, the Company by letter notified the defendant of the lease and of the cancellation of the permit, and enclosed a cheque for \$6.15.

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The plaintiff swears that in May, before the defendant did any work on the land, he saw the defendant, took the lease over to him and read it to him, and that the defendant's reply was that the plaintiff's lease was no good, that it was a forgery and that he, the defendant, had the land leased from the Company. The defendant, however, went on and sowed the land, the broken portion, about 10 acres. This evidence is corroborated, and I assume the trial Judge believed it.

It is objected by the defendant that the authority of Thompson, who executed the lease on behalf of the Company, was not proved. This same Thompson, described as Land Commissioner for the Hudson's Bay Company, signed the defendant's permit. The plaintiff went into possession under this document, and no one had a right to question it but the Company. The defendant further objected that the document in question was not a lease at all, and that the plaintiff had only grazing rights. In any event the plaintiff was entitled to peaceable possee-

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sion, and the use to which he might put the land was a question between himself and the Company.

At first I thought the Judge assessed the damages a little high; but, if the plaintiff's version is correct, and the defendant committed the trespass with full knowledge of the plaintiff's title, then the Judge may have taken that feature of the case into consideration.

I would dismiss the appeal with costs.

*Appeal dismissed.*

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#### COURT OF APPEAL.

#### DOUGLAS V. CANADIAN NORTHERN RAILWAY.

Before HOWELL, C.J.M., RICHARDS, CAMERON and HAGGART, J.J.A.

*Practice—Judge rescinding his own order—Jurisdiction of Local Judge of the King's Bench—Jurisdiction of Referee—King's Bench Act, Rules, 27 (b) and 34—Substantive application on new material.*

The Local Judge of the King's Bench at Brandon made an order, on notice to the defendants, striking out their defence for refusal to answer certain interrogatories. After the order was taken out, but before plaintiff had signed judgment upon it, the defendants delivered answers to the interrogatories. Plaintiff having signed interlocutory judgment under the order, defendants moved before the Local Judge to set aside the judgment and for leave to file a new statement of defence, when the Local Judge made the order asked for, against which plaintiff appealed.

*Held*, that the defendants' application was not in the nature of an appeal from the first order or of an application to vary or rescind it, and, therefore, did not come within paragraph (b) of Rule 27 of the King's Bench Act, but was a substantive application on fresh material which the Local Judge had jurisdiction to entertain, and that he was right in making the order appealed from.

DECIDED: 9th June, 1913.

Statement. THE Local Judge of the King's Bench at Brandon made an order, on notice to the defendants, striking out their defence for refusal to answer certain interrogatories. After the order was taken out, but before plaintiff had

signed judgment upon it, the defendants delivered answers to the interrogatories. Plaintiff having signed interlocutory judgment under the order, defendants moved before the Local Judge to set aside the judgment and for leave to file a new statement of defence, when the Local Judge made the order asked for, against which plaintiff appealed to a Judge in Chambers.

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Curran, J., allowed the appeal and set aside the order of the Local Judge, and defendants appealed from his order.

*P. A. Macdonald* for defendants.

*J. F. Kilgour* for plaintiff.

*Held*, by the Court of Appeal, that the application to the Local Judge did not come under Rule 27 s.s. (b), of The King's Bench Act; but was a substantive application on fresh material to set aside the interlocutory judgment which the Local Judge had jurisdiction to entertain. The defendant Company was entitled, in the circumstances set forth, to have the judgment set aside, and to file a statement of defence. The order of Curran, J., was accordingly reversed and the order of the Local Judge restored.

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## JOHNSTON V. DOWSETT.

Before CURRAN, J.

*Misrepresentation—Vendor and purchaser—Sale of going concern—Caveat emptor—Simplex commendatio.*

The plaintiff's claim was for specific performance of the defendant's agreement to purchase certain lots in the village of Elgin, Manitoba, and certain goods and chattels consisting of horses, buggies, cutters, harness, &c., constituting the equipment of a livery business carried on by the plaintiff in a barn or stable situated on said lots, for the sum of \$10,500.

The trial Judge's findings of fact were that, in making the purchase, the defendant relied on the following statements and representations of the plaintiff as to the property and business, viz: that the earnings of the business were from \$20 to \$30 a day, whereas they did not exceed \$10 a day; that the horses, except one team, were from 5 to 7 years old, whereas they were all more than double the ages represented; that the barn and equipment were in first class condition, and that the proprietor of the only livery business in competition with the plaintiff was a man who drank very heavily and was neglecting his business; that these representations were untrue to the knowledge of the plaintiff; that they were a substantial inducing cause of the sale and were material to the contract, also that the actual value of the property purchased did not exceed \$5,000.

*Held*, that the defendant was justified in refusing to complete his purchase and the plaintiff could not have specific performance.

The representations referred to went far beyond *simplex commendatio*, as the plaintiff knew well that the defendant was placing trust and confidence in him and was acting without independent advice or proper investigation.

The defendant had some months previously purchased a chattel mortgage upon the goods and chattels and had, at that time, made an inspection of the property that was sufficient for that purpose. He made no further inspection or investigation before entering into the purchase in question.

*Held*, that, under the circumstances, the rule of "*caveat emptor*" should not be applied to prevent the defendant from getting relief from a bargain so improvident.

DECIDED: 23rd June, 1913.

## Statement.

ACTION for specific performance of an agreement of sale between the plaintiff and defendant whereby the plaintiff agreed to sell and the defendant agreed to purchase Lots 28, 29, 30 and 31 in Block 3, in the Village of Elgin, Manitoba, and certain goods and chattels consisting of horses, buggies, cutters and harness, etc., con-

stituting the equipment of a livery business conducted by the plaintiff in a barn or stable erected on said lots, at and for the price of \$10,500.

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The defendant admitted the agreement, but refused to carry out the sale alleging that it was induced by the false and fraudulent representations of the plaintiff and one W. F. Yeo.

*H. A. Bergman* for plaintiff.

*C. H. Locke* for defendant.

CURRAN, J. Both parties to this suit are farmers. The plaintiff is a younger man than the defendant and appeared to be much more intelligent and to have a fuller knowledge of business affairs. He had spent the last 9 or 10 years farming, and had some 8 months' experience in the business in question prior to the sale. The defendant seemed to be a very simple and innocent kind of a man, without much, if any, business experience. He had been a sailor for 8 years before coming to this country and had had some 19 years farming experience in Manitoba, but no business experience of any kind. I think the plaintiff is very much the shrewder and more capable man of business of the two.

It appears that the parties first became known to one another in November, 1912. The plaintiff was then conducting the business in question, and the defendant came to Elgin to inspect the barn and contents, which constituted the security in a certain chattel mortgage and land mortgage given by the plaintiff to one J. W. Yeo. The property formerly belonged to J. W. Yeo, who sold it to the plaintiff in April, 1912, and took mortgages on the land and chattels to secure the unpaid purchase money. J. W. Yeo assigned these mortgages to his son W. F. Yeo in July, 1912, and W. F. Yeo, being desirous of selling the mortgages, offered them to the defendant, who, accordingly, before buying, went to Elgin to see the security for

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himself. He there met the plaintiff and made a cursory inspection of the barn and horses. That evening W. F. Yeo brought the plaintiff up to the defendant's room at the hotel and a good deal of talk followed as to the business done, the value of the property, etc., but the defendant had then no intention of actually buying the business. He did, however, purchase the mortgages from W. F. Yeo.

The parties next met about December 6th at Warren, Manitoba, and the defendant drove the plaintiff out to his farm, and on the way out the purchase of the livery business was suggested by the plaintiff to the defendant and discussed to a certain extent. On the afternoon of that day, at the defendant's house, the matter was apparently fully gone into and it was upon this occasion that the alleged representations were made by the plaintiff to the defendant which induced the sale.

The defendant swears that the plaintiff told him he was doing a good business, a very prosperous business and that he was taking in from \$15 to \$20 a day in the livery business, that the barn and equipment were in first class shape, that the horses were only from 5 to 7 years of age, except the dray team which was represented to be 9 and 13 years respectively, that the feed receipts were from \$3 to \$4 daily, that the dray was earning from \$5 to \$10 per day, and that there was a large amount of driving done from the livery. The parties drove over to W. F. Yeo's farm that evening, and the matter was further discussed, and, among other things, the plaintiff then told the defendant that the man who was running the opposition barn in Elgin drank very heavily and neglected his business. W. F. Yeo took part in the conversation and assisted the plaintiff to make the sale. He says he did not, but the plaintiff in his discovery evidence says he did; and the defendant says he did.

The only evidence of any specific representation made

by W. F. Yeo is to the effect that Yeo told the defendant the dray team was earning from \$5 to \$10 a day.

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The plaintiff and the defendant returned to the defendant's home when, to bring matters to a head, the plaintiff told the defendant he had another offer for the business and must have an answer from the defendant the next day. This apparently had the desired effect, for the sale was concluded that evening and the next day the parties left for Winnipeg to have the agreement of sale prepared and executed.

The plaintiff and W. F. Yeo both deny positively that they made any of the statements or representations alleged by the defendant; but the plaintiff admits in his examination for discovery that he knew, before making the sale to the defendant, that the ages of the horses were incorrectly stated in the chattel mortgage to Yeo and that he did not tell the defendant of this. He also admits that he told the defendant that the man who was running the opposition barn drank heavily and was not looking after it the way a man should look after his business, and also that he was getting about half the draying business of the village.

The plaintiff admits that he never had the biggest business in Elgin nor even half the business, that Naylor, the opposition man, had a big business and that, when he took the business over from J. W. Yeo, it was run down and in bad condition. The plaintiff also admits that in December the defendant expressed dissatisfaction with the business, but says he did not say why he was dissatisfied, and that the defendant never at any time made any complaint as to misrepresentations. I find it hard to give credit to this statement.

The defendant says the first suspicion he had arose after seeing such part of the plaintiff's books as were given to him, namely four sheets torn out of the last account book which the plaintiff had in use, and that the

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CURRAN, and are now part of Exhibit 7.

He also found that Naylor, his business competitor, was a very efficient business man having a good concrete barn and well equipped, that he did at least three times as much draying as was coming to the plaintiff's barn, and that, as to the feed business, Naylor practically had it all, and that customers only came to the plaintiff's barn when Naylor's barn was full.

He says he complained to the plaintiff that things were not as represented, and the only reply he got was that he, the defendant, had seen the things for himself.

I believe the defendant did complain, but without avail. As a result he refused to carry out the sale. The defendant's son was present during part of the conversation at defendant's house on the day the bargain was made and corroborates the defendant as to at least one of the representations alleged to have been made, namely, that the livery business was earning from \$15 to \$20 a day. This witness also says that the barn was in a poor state of repair and so cold that it injuriously affected the feed business and that the dray was standing idle most of the time.

Naylor was called and testified that he was doing the larger business of the two when plaintiff was in business and that this applied to all lines, livery, draying and feed. He says his experience is that the cash part of the business represents only about one-third of the business done. The plaintiff, on the contrary, says about one-half. Naylor's whole business in 1912 only netted him \$1,000. He says he looks after it himself and he appeared to me a very competent man and one who knew this line of business thoroughly. I have little hesitancy in finding that the statement made by the plaintiff about Naylor's



drinking habits and neglect of business was wholly untrue and must have been knowingly untrue, and made with the intention of misleading and deceiving the defendant in a very important factor to be considered in the transaction, namely the sort of business competition to be encountered, which, in this instance, was belittled and made to appear not a serious matter to be reckoned with.

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I think also that there is little doubt that the horses were all more than double the ages represented by the plaintiff, and that the barn was in a bad condition of repair, the floor practically a wreck, as Draper puts it; the planks and joists rotten, and the floor unsafe for heavy animals; that the feed portion of the barn was very cold, so much so as to militate against business in that line during the winter months.

While there is no allegation of fraud or misrepresentation as to the value of the property, I think this element is not altogether irrelevant with a view to judging of the honesty of the transaction and the credibility and general good faith of the plaintiff in making the representations he did make to induce the sale. The property was sold for \$10,500. Now the witness Draper, who is a disinterested, and I think a competent, witness on the question of values, says that \$600 would be a good fair value for the lots, \$2,000 for the barn, \$600 for the shed and automobile garage, that the 9 horses are not worth more than \$620; the buggies, cutters, etc., \$450, and the harness and other equipment \$200, and an iron safe \$50, in all \$4,520. He says the good will of this business was not worth anything. This man had 8 years experience in business in this identical barn and I think his valuation is to be depended upon.

The plaintiff values the 9 head of horses at \$1,800, nearly \$1,200 more than Draper, but he admits that he would not give this figure for them again if he knew their ages, a very significant admission. In view of the ages

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of these horses and the length of time they had been in service, I think Draper's valuation very much nearer the truth than the plaintiff's.

James W. Yeo, called by the plaintiff, says that he valued the entire property in January, 1912, at \$8,500, and yet he says he would consider it worth \$10,000 to-day. It is significant that he did not pay cash for the property but got it in trade for land. The chattels and buildings would certainly not improve in value but would rather decrease, and I fail to see that, in a little village like Elgin of about 400 inhabitants, how the land could have become any more valuable in so short a time. I think this witness is not candid in making this statement as to value.

He who alleges fraud must prove it strictly, but fraud is sometimes made out of many little things which have a cumulative effect on the mind of the party deceived. The parties here were in treaty over the purchase for the best part of a day at the defendant's house, again at the Yeo farm and later on in the evening at the defendant's home, and much information relative to the business must have been communicated during that time.

W. F. Yeo says that the defendant made inquiries of the plaintiff as to the business he was doing and that plaintiff said he was doing a very good business. I think it unbelievable that no details were asked for by the defendant from the plaintiff as to the earnings of the business, and that no information on this subject was given.

The statements alleged to have been made by the plaintiff relate to just such matters as one would naturally expect a prospective buyer to inquire about. It would need no great astuteness in the defendant to ask questions as to the earnings of the business, ages of horses, the character and business capability of the only competitor in the place. Much might turn upon the answer to this last inquiry, and it would seem to me a most pertinent

one under the circumstances, and which, if asked at all, should have been answered truthfully. There is no doubt the plaintiff deceived the defendant in this respect, representing Naylor as a man addicted to drink, who neglected his business and therefore a rival not to be feared. I think this a very material matter and one calculated to have considerable influence on the defendant's mind when considering the proposition to buy.

I do not believe the plaintiff when he says no questions were asked him and no information vouchsafed by him as to the daily takings of the business in its various branches. This is too improbable to be accepted. I think he was anxious to sell, having realized that he had made a mistake in buying the business himself and found it unprofitable.

He kept no proper books of account and the one produced, Exhibit 7, is not intelligible, and does not furnish sufficient information as to the business done and the cost of operation so that profits could be ascertained. It contains no entries of the cash business. The defendant's solicitor has examined it and says it shows a credit business from all sources as follows: In the month of June, \$111.90; July, \$117.40; August, \$132.70, and September, \$147.00. These figures were not objected to, and I will use them for illustration. The amount of cash business done during these months is pure guess-work, and no reliance can be placed upon the plaintiff's estimate of the cash receipts; but, allowing the cash business to have equalled the credit business, it would work out that during these months the gross takings of the business, exclusive of Sundays, would be as follows: June, \$8.60 a day; July, \$9.00 a day; August, \$10.00 a day, and September, \$11.30 a day. The plaintiff says that during the last two months, October and November, the business from all sources ran \$400 a month. The large increase was caused by one thing, by Government Telephone

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work, \$150, which was exceptional and not likely to occur again.

Analyze this, deduct \$75 a month for the exceptional increase, and we have the gross monthly average \$325, or about \$12.50 a day. It is apparent, then, that, taking the plaintiff's books for what they are worth, and allowing him credit for as much more to represent the cash receipts, his average gross daily takings during June, July, August, September, October and November, nearly the whole period during which he conducted the business, were only \$10.65 a day. If expenses are deducted the net amount would be about \$4.30 a day.

Upon the whole it would appear from the plaintiff's evidence, the net profit per day would be about \$4.25, or \$10.65 a day gross takings, as against an average of about \$23, which the defendant says was represented to him—a very wide discrepancy, and if at all accurate representing a difference of over \$12 per day, surely enough to make all the difference between success and failure in the business to the defendant.

But I think these figures altogether excessive and largely speculative. Taking the average monthly expense of the business at \$166, according to the plaintiff's evidence, the net profit per day would be about \$4.24, or some \$1,330 a year, exclusive of Sundays. This would leave nothing for living expenses, and is much more than Naylor with a much larger business was able to make, and Draper says he never made \$1,000 a year clear during the 8 years he was in the business. However, these figures seem to demonstrate that the representations alleged to have been made by the plaintiff as to the earnings of the business were greatly in excess of the fact.

It is true the defendant saw the property before buying, that is, he saw it in November when dealing for the two mortgages, and made a sort of inspection, perhaps close enough to satisfy him that he might safely invest

his money in these mortgages, as this was not the only security, for he had the personal covenant of the plaintiff besides.

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I do not think the defendant can be held, under the circumstances, to be bound by the maxim *caveat emptor*. He did not then think of buying; that was an after-consideration brought about by the plaintiff himself nearly a month later.

I find that the defendant did rely on the statements and representations of the plaintiff as to the property and business made to him at the defendant's home on December 6th as the main inducement to the purchase. I find that these representations were as follows: that the takings from the livery business were from \$15 to \$20 a day; from the dray business, from \$5 to \$10; that the horses, except the dray team, were from 5 to 7 years old; that the barn and equipment were in first class condition; and that the man Naylor, who was running the other barn, was a man who drank very heavily and was neglecting his business. I find that all of these representations were untrue to the knowledge of the plaintiff; that they were a substantial inducing cause of the sale, and were material to the contract.

I think that the plaintiff greatly exceeded the license afforded him by the rule *simplex commendatio*; and, while some of the representations alleged against him might well fall within that rule, I do not think the foregoing which I have specified do, and that the plaintiff must be held to have knowingly misrepresented the business to the defendant to induce a sale which he was anxious to make, well knowing that the defendant was placing trust and confidence in him and acting without independent advice or proper investigation.

I think also that the younger Yeo aided the plaintiff and, in so doing, was not a whit more scrupulous as to the

1913 means adopted to attain that end than the plaintiff  
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Again, the grave disparity in value affords strong ground to suspect the honesty of the transaction. I am satisfied upon Draper's evidence that the defendant was induced to offer \$10,500 for property worth no more than \$5,000, and was led to believe that the business was in a flourishing and profitable condition when the reverse was the case.

Taking all these circumstances into consideration and weighing the evidence and passing upon the credibility of the witnesses as best I can, I think the defendant has proved enough to exonerate him in a court of equity from so improvident a bargain, one which I have not the slightest doubt he was induced to enter into by the plaintiff's fraud. I ought not to hold him to it and must therefore refuse specific performance.

As the defendant has been in possession since December 10, 1912, having been forced to continue the business owing to plaintiff's refusal to permit him to withdraw from the contract, he must account to the plaintiff for the revenue received during such period. If the parties cannot agree as to what is fair under the circumstances, there will be a reference to the Master to take the accounts, and the defendant will pay the plaintiff any amount found due upon such reference.

Of course allowance must be made the defendant for his loss of time and services in conducting the business.

There will be judgment dismissing the plaintiff's action for specific performance with costs, and declaring that the agreement of sale in question is null and void and must be delivered up and cancelled.

## COURT OF APPEAL.

## ROSS V. WEBB.

Before HOWELL, C.J.M., PERDUE, CAMERON and HAGGART, JJ.A.

*Principal and agent—Liability of sub-agent for money of principal collected for agent—Privity of contract—Liquidation of solvent partnership business.*

The defendant was employed by the two partners of a firm to act as liquidator in winding up the affairs of the firm which was solvent. In so doing he collected moneys which, to his knowledge, belonged to the plaintiff. On retiring from his employment with the firm, the defendant accounted to the partners for the moneys in his hands, in part, by paying himself the sum of \$1160 for his services. The firm objected to this charge as excessive.

*Held*, that there was no privity of contract between the plaintiff and the defendant and the latter was not liable to account to the plaintiff for the said moneys.

A claim for money received cannot in general be made upon a sub-agent who receives it only on account of the agent without any privity or relation to the principal to whose use it is paid: *Leake on Contracts*, 6th ed. 73.

DECIDED: 9th May, 1913.

THE plaintiff brought this action claiming that certain Statement. moneys collected under an agreement, set forth in the judgment, were his and collected for him, and that the defendant Webb, as the trustee of such moneys for him, was responsible to him for payment.

The following judgment at the trial was delivered by

MACDONALD, J. Under an agreement between Ida V. Chalmers and Howard A. D. Chalmers, doing business under the name of Walter Suckling & Co., the firm dissolved partnership and, for the purpose of winding up its affairs, appointed the defendant Webb arbitrator under the provisions of their partnership agreement, empowering this defendant to realize upon and get in the moneys and accounts, bills payable and all other assets of the firm and pay out the moneys so realized.

1st. In payment of the costs and expenses of the winding up;

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MACDONALD, 3rd. In payment to the members of the said partnership of all moneys owing to them, or either of them, respectively by the said partnership.  
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4th. The balance to be paid over to the said partners according to their respective shares or interests in said partnership, as set out in said partnership agreement.

Under this agreement all the assets of the firm, consisting of real estate, agreements of sale of real estate or mortgages upon real estate, whether standing in the joint names of the parties or in the individual names of either of them, being partnership property, were to be assigned to the Western Trust Company to be realized upon as soon as could be done without sacrifice of the same, and at a price to be mutually agreed upon between the parties or, in case the parties could not agree, then at a price to be fixed by the defendant Webb.

For the convenience of all concerned, the defendant Webb conducted the liquidation of the firm at the offices occupied by that firm and had the assistance of the staff of the firm, as well as the assistance of his co-defendants (who are his partners in the business of accountants) and the office staff of his firm.

Among the securities taken over by the defendant Webb were certain agreements for the sale of land made between one Axtell and Sarah Jane George and Axtell and W. D. Law. One of these was assigned by Axtell in August, 1907, to the plaintiff and the individual members of Walter Suckling & Co. The latter on the 9th October, 1908, assigned their interest in this agreement to Sarah Jane George.

The moneys payable under this agreement were collected by the defendant Webb and handled by him, as were the collections on behalf of Walter Suckling & Co., and no distinction was made between those moneys and the



moneys of that firm. This agreement was in the hands of Walter Suckling & Co., to whom was assigned the duty of looking after and collecting the moneys falling due thereunder. As a matter of fact, the firm claimed some interest in the agreement, having advanced moneys to the plaintiff in connection with it, and they now claim an interest in the moneys collected from it; how much does not seem clear. The witness Chalmers says their interest in it was but small, something in the neighborhood of \$28.

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Prior to the defendant Webb taking charge, collections made by the firm were credited to an account called "Speculation and Investment Account." This account the defendant dissected by opening an account for the individual party to whom the collection belonged, and he started off his work by keeping two separate Trust Accounts, one for the firm's trust collections, and the other for the firm's moneys. This he found that he could not continue, as trust funds were being used generally in liquidation of the firm's debts. At the time the defendant Webb took charge there were not sufficient moneys paid over to him to pay out trust moneys previously collected by the firm, and, as moneys came in, irrespective of the source from which they came or to whom credited, they were paid out for payment of the firm's liabilities. The moneys in question here were paid out in this way long before the defendant Webb ceased to represent the firm of Walter Suckling & Co. under the agreement referred to.

When the defendant Webb was retiring from his employment with the Suckling Co. he paid himself for his services the sum of \$1160, being within \$32 of the moneys in his hands.

The plaintiff brings this action claiming that the moneys due him and collected under the Axtell agreement were his and collected for him, and that the

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defendant Webb, as the trustee of such moneys for him, is responsible to him for payment.

There never was any agreement or arrangement made between the plaintiff and Webb whereby the latter was to assume this responsibility.

The witness Chalmers, who is directly interested in this action, says that he arranged with the defendant Webb that the latter was to collect under this agreement and keep the moneys separate and apart from other collections, and credit and remit to the plaintiff. The defendant Webb denies this, and it seems strange that, if such an understanding was arrived at, this defendant should demand and receive express authority to pay out moneys received under this same agreement, the property of Miss Womald, and collected by this defendant, and, if such instructions were given, there does not appear to be any reason why they should not have been obeyed, as there were ample moneys on hand at the time this collection was made with which to pay.

The defendant Webb denies that there ever was such an understanding or arrangement and, such being the case, I cannot, on the unsupported evidence of Mr. Chalmers, give effect to his contention in the face of this denial.

The position then is simply this: Is the defendant Webb, by reason of his having collected this money as liquidator for Suckling & Co., knowing it to belong to the plaintiff, liable to the plaintiff. It is contended by Suckling & Co. that this defendant has not accounted to them for it; but I find that he has. If he has overcharged in his account for expenses of liquidation, that is a matter between him and Suckling & Co., and the real purpose of this action is plainly an effort on the part of the latter company to recover from this defendant a part of the moneys retained by him for such expenses.

There is clearly no privity between the plaintiff and the defendant Webb; he was not acting for the plaintiff, but simply as the servant of Suckling & Co., and accountable to that firm only. It is not the winding up of an insolvent firm, where the liquidator might be held responsible for trust funds collected, but the voluntary winding up of a thoroughly responsible company, viewing it from a financial standpoint.

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"A claim for money received cannot in general be made upon a sub-agent who receives it only on account of the agent without any privity or relation to the principal to whose use it is paid." *Leake on Contracts*, 6th ed. 73. And this principle seems to me to apply directly to this case.

I grant a nonsuit with costs.

Plaintiff appealed.

*M. G. Macneil* and *B. L. Deacon* for plaintiff, appellant.

*C. H. Locke* for defendants, respondents.

THE COURT dismissed the appeal without calling on respondents' counsel.

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## COURT OF APPEAL.

## SMITH V. NORTH CYPRESS.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*Local option by-law—Publication of notice of the voting—Liquor License Act, R.S.M. 1902, c. 101, s. 66, as amended by 1 Geo. V, c. 25, s. 1, and s. 76A as enacted by 2 Geo. V, c. 34, s. 1.—Irregularity.*

The requirement of section 66 of the Liquor License Act, R.S.M. 1902, c. 101, as amended by s. 1 of c. 25 of 1 Geo. V, that the Council shall publish the notice of the voting there provided for in some newspaper within two weeks after the first and second readings of a proposed local option by-law, is mandatory and failure to comply with such requirement is fatal to the by-law.

*Hall v. South Norfolk*, (1892) 8 M.R. 438; *Little v. McCartney*, (1908) 18 M.R. 323, and *Shaw v. Portage la Prairie*, (1910) 20 M.R. 469, followed.

The failure to comply with that requirement is not a mere irregularity, but a matter of substance, and is, therefore, not cured by section 76A of the Act as enacted by section 1 of c. 34 of 2 Geo. V.

*Re Bell and Township of Elma*, (1906) 13 O.L.R. 80, decided under the corresponding provision in the Ontario Municipal Act, s. 204, followed.

DECIDED: 21st May, 1913.

**Statement.** APPLICATION to quash a Local Option by-law.

On the hearing of the application the following judgment was delivered by

MATHERS, C.J.K.B. This is an application to quash Local Option By-law No. 346 of the Rural Municipality of North Cypress. Nine objections in all are taken to this by-law, but I only find it necessary to consider one.

Section 66 of The Liquor License Act, as amended by cap. 25, section 1, of the Acts passed in 1911, provides that the Council shall, within two weeks after the first and second readings of the proposed by-law and before the third reading and passing thereof, publish in some newspaper in the municipality, if one be published therein, and, if not, in the newspaper published nearest to such municipality and in the Manitoba Gazette a notice stating the object and purpose of the proposed by-law, etc.

The by-law received its first and second readings on the 12th day of October, 1912. The first publication of the notice required by section 66 in a newspaper took place on the 1st of November, 1912, and the first publication of the notice in the Gazette was on the 9th day of November, 1912. The objection is that the requirements of section 66 have not been complied with, and that therefore the by-law should be quashed. In my opinion the objection must be sustained.

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That the provision of this section as to the publication of notice is mandatory and that failure to comply with it is fatal has been decided in numerous cases in this Province commencing with the decision of the late Mr. Justice Killam in *Hall v. South Norfolk*, 8 M.R. 438. To the same effect are *Re Cross v. Town of Gladstone*, 15 M.R. 528; *Little v. McCartney*, 18 M.R. 323; *Hatch v. Oakland*, 19 M.R. 692, and *Shaw v. Portage la Prairie*, 20 M.R. 469. Quite consistent with these Manitoba cases are the decisions in the Province of Ontario.

The notices in this case, in order to comply with the statute, ought to have been published on or before the 26th day of October, 1912. As they were not so published, the by-law must be quashed unless it is saved by the saving provision introduced into the Liquor License Act as section 76A, which is as follows:

"No local option by-law or repealing by-law shall be declared invalid by reason of non-compliance with the provisions of this Act covering the case *as to the taking of the poll or the counting of the votes or by reason of any mistake in the use of the forms contained in this Act or by reason of any irregularity*, if it appears to the tribunal having cognizance of the question that the proceedings on the petition and the voting were conducted substantially in accordance with the requirements of this Act and that such non-compliance, mistake or irregularity did not affect the result of the voting."

It will be observed that this clause does not extend to all provisions of the Liquor License Act relating to local

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option by-laws, but is expressly confined to the provisions of the Act as to the taking of the poll or the counting of the votes or the use of the forms contained in the Act or to irregularities. If the provision which has not been complied with relates to any of these matters, then the by-law shall not be declared invalid, if it appears to the Court, (1) that the proceedings on the petition and the voting were conducted in substantial accordance with the requirements of this Act, and, (2) that such non-compliance, mistake or irregularity did not affect the result of the voting.

Section 76A is practically identical with section 204 of the Ontario Municipal Act which has been held in that Province to apply to local option by-laws. The provision as to publication of the notice required by section 66 cannot be said to relate to the taking of the poll or the counting of the votes. It manifestly does not relate to the use of the forms contained in the Act. Then is it an irregularity?

It was held in *Re Bell and the Township of Elma*, 13 O.L.R. 80, by the Divisional Court that the omission in a local option by-law of the time and place where votes are to be summed up, as provided for by sections 341 and 342 of the Ontario Municipal Act, was more than an irregularity and that such a defect was not cured by section 204 of the Municipal Act. In the later case of *Schumacher v. Town of Chesley*, 21 O.L.R. 522, the view was expressed by Mr. Justice Riddell that the Ontario section 342, which provides for the actual appointment of scrutineers pursuant to the provisions of the by-law, related to the taking of the poll, but that section 341, which related to the fixing by the by-law of the time and place for the appointment of scrutineers, did not relate to the taking of the poll.

I cannot hold that the entire omission to publish the notice required by section 66 within the two weeks pre-

scribed by the statute was an irregularity. To my mind it is a matter of substance and must be substantially complied with or the defect is not cured by the curative provision.

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I arrive at this conclusion with much regret. As stated by Meredith, C.J., in *Re Hickey and Town of Orillia*, 17 O.L.R. at 323:

"It is a very serious thing, after the electors have gone through the stress of a contest of the kind that these contests are, and the statutory majority has been polled in favor of the by-law, that some trifling irregularity on the part of some officer, entirely innocent, and which in all probability has not had the slightest effect upon the result, should be held to undo what has been done."

I must assume, however, that the Legislature had a purpose in view in requiring the notices required by section 66 to be published within two weeks from the second reading of the by-law, which the municipal officers are not at liberty to disregard.

An order must go quashing the by-law with costs.

The Municipality appealed.

*H. R. Hooper* for appellants.

*F. M. Burbidge* for respondents.

THE COURT dismissed the appeal without calling on respondent's counsel.

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## COURT OF APPEAL.

## MACDONALD V. DOMESTIC UTILITIES MFG. CO.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, JJ.A.

*Discovery—Examination for discovery—Officer of defendant Company resident abroad—Service upon him while temporarily within the jurisdiction—Procuring his attendance for examination without an order—Practice—King's Bench Act, Rules 389 and 425—Striking out defence for failure to attend—Subpœna.*

*Per* HOWELL, C.J.M. and RICHARDS, J.A. A motion to strike out the defence and counter-claim for non-attendance of an officer of the defendant company for examination for discovery should be refused when the subpoena served on the officer requires him to attend upon the examination, not only at the time and place named in the appointment, but also to attend there "from day to day until the above cause is tried to give evidence on behalf of the . . ."

There is no authority whatever for this latter requirement, and a person who seeks such an unusual remedy as striking out the other party's defence for default must show that his own proceedings leading up to the application have in all respects been regular.

*Pec* PERDUE, CAMERON and HAGGART, JJ.A. The motion should be refused because the defendant's solicitor had, as shown by an affidavit filed on the application to the Referee, offered to produce the officer, whose residence was at Los Angeles, California, for examination either on his return to Winnipeg or at Los Angeles, where the Company's head office was, which offer still stood open, but had not been accepted. The Court would not in any event make an order striking out the defence. The most it could be asked to do would be to order the officer to attend here at his own expense.

*Per* PRENDERGAST, J., in the Court appealed from. An officer of a foreign company, defending an action who, himself, resides out of the jurisdiction, cannot be compelled to attend here for examination for discovery by service upon him here of an appointment and subpoena under Rule 389 of the King's Bench Act; though an order might, in a proper case, be made under Rule 425, requiring such attendance.

*Connolly v. Dowd*, (1897) 18 P.R. 38, followed.

DECIDED: 9th June, 1913.

**Statement.** THE defendants were a corporation, licensed under the Extra-Provincial Corporations Act, and had a head office for Manitoba at Winnipeg. Their Vice-President, who resided at Los Angeles, in California, was temporarily in Winnipeg when the statement of defence was filed.

The plaintiff's solicitors wished to examine him for



discovery, and got an appointment from a special examiner and served him (the Vice-President) with that and with a copy of a subpoena, to attend before the said examiner at the time and place mentioned in the appointment, paying him, at the same time, witness fees for one day. He did not attend as required, and the plaintiff moved to strike out the statement of defence.

The Referee refused the application. Plaintiff then appealed to Prendergast, J., who dismissed the appeal.

From that decision he appealed to the Court of Appeal.

On the appeal from the Referee, the following judgment was delivered by

PRENDERGAST, J. It seems plain, under the decision in *Connolly v. Dowd*, 18 P.R. 38, that service on Crooker of an appointment and subpoena under Rule 389 was not the proper procedure. What was required was an order under Rule 425 as amended.

Then, Crooker having failed to appear, the plaintiff moved before the Referee to have the defence struck out under Rule 398, which the Referee refused.

The plaintiff now appeals from that decision. But it is clear that the Referee could not penalize the defendant Company on the ground that one of their officers had failed to attend for examination, when the latter was never properly required to do so.

In my opinion this disposes of the whole appeal.

On the hearing, however, the plaintiff made the alternative application, not mentioned in the notice of motion, that I make an order under Rule 425 to secure Crooker's attendance.

Of course, if the matter were brought up in the proper way, such an order could be made; and, if the latter were not complied with, then the defence could be struck out under the said Rule. But the granting of such an order is a matter of discretion, and in *Cox v. Prior*,

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18 P.R. 492, the order was evidently made having in regard the fact that the party to be examined was then, and would be for quite a while, in Ontario where he was attending to certain duties.

But here the evidence is that Crooker is and has been for months in California where his permanent residence is, and there is surely not a shred of material at hand which would justify me in taking the extreme course of ordering him to attend at Winnipeg, even if Rule 425 were broad enough to allow such an order.

But I would rather take the position that this last application is not before me, not being stated in the notice of motion.

The appeal will be dismissed with costs.

Defendants appealed.

*J. Galloway* for plaintiff, appellant, cited *Connolly v. Dowd*, 18 P.R. 38; *Comstock v. Harris*, 12 P.R. 17; *Smith v. Greey*, 11 P.R. 345; *Newby v. Von Oppen*, L.R. 7 Q.B. 293; *Haggin v. D'Escompte de Paris*, 23 Q.B.D. 519, and *Badcock v. Cumberland*, [1893] 1 Ch. 362.

*H. V. Hudson* for defendants, respondents, cited *McMurray v. G.T.Ry.*, 3 Ch. Ch. 130; *Connolly v. Dowd*, 18 P.R. 38, and *Grant v. Anderson*, [1892] 1 Q.B. 108.

RICHARDS, J.A. There was much argument as to whether the plaintiff was entitled to proceed in the way he had done, by appointment and subpoena, or whether he should not have procured an order for the examination of the Vice-President under King's Bench Rule No. 425. In the view I take it is not necessary to consider that point.

I think the process so served upon the Vice-President was so defective in form that the plaintiff is not entitled to ask the Court to treat him as in contempt for not attending, or to apply to strike out the statement of defence.

It is not the appointment itself, by virtue of which a

party so served is bound to attend. The subpoena served upon him is the order and process of the Court. It is by virtue of that process, if properly taken, that he could be compelled to attend. The subpoena required him to attend before the examiner at the time and place named in the appointment, and so far I think was sufficient; but it required him to attend there "from day to day until the above cause is tried, to give evidence on behalf of the . . . ."

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There was no power whatever to require him either to attend there until the trial of the cause, or to there give evidence on behalf of either party to the cause.

I fail to see why, when served with a subpoena so worded, it was necessary for him to attend at all. There is little doubt that he knew, from the appointment, what the plaintiff intended to bring him to the examiner's office for; but the appointment itself could not compel his attendance, and that process which, if properly issued, would in law have compelled his attendance, purported to require him to attend for a purpose for which it could not be properly issued.

The above may seem somewhat technical; but I take the rule to be that those who seek such an unusual remedy as striking out the other party's defence for default, must show that they themselves have, in all things, been regular in the proceedings leading up to the application. The plaintiff has, I think, failed in this.

I would dismiss the appeal with costs in the cause to the defendants.

CAMERON, J.A. Without dealing with the other matters raised on this appeal, it seems to me that the position taken by the solicitors for the defendant company, as set forth in the affidavit of Mr. Hudson (filed on the application before the Referee), is sufficient to entitle this Court, in dealing with a matter lying within its discre-

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tion, to refuse this application. That affidavit is not controverted in any way, and we are informed thereby that Mr. Hudson offered to produce Mr. Crooker for examination either on his return to the City or at Los Angeles, where the Company's head office is. As I understand it, that offer still stands. We would not, in any event, make an order striking out the defence. The most that we could be asked to do would be to order Mr. Crooker to attend here for examination at his own expense. In view of Mr. Hudson's offer, and of the refusal of the plaintiff to accept that offer, I consider he has placed himself in a position which does not entitle him to succeed on this appeal. It is still open to him to proceed to examine Mr. Crooker in the manner prescribed by the rules.

I think the appeal should be dismissed with costs to the defendant in the cause.

HOWELL, C.J.M., concurred with Richards, J.A.

PERDUE, J.A., and HAGGART, J.A., concurred with Cameron, J.A.

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## JUST V. STEWART.

Before CURRAN, J.

*Landlord and tenant—Overholding tenant—Forfeiture of lease—Breach of covenants in lease—Covenant to use premises as a "store" only—Covenant not to carry on or permit to be carried on any other trade or business—Assigning or sub-letting without leave—Construction of covenant.*

The plaintiff sought to evict the defendant from his tenancy of the premises in question, by a summary application under the Landlords and Tenants Act, and alleged breaches of several of the covenants in the lease of the premises, which contained the usual proviso for re-entry on non-performance of covenants.

The defendant rented the premises for the expressed purpose of doing a boot and shoe repairing business and of selling boots and shoes by retail, which latter was not done.

The defendant had been in possession nearly a month before the lease was signed. During that period he had erected a wooden sign projecting 10 feet from the building. The projecting sign was there when the plaintiff signed the lease and he knew that then.

*Held*, (1) The mere giving by the tenant of permission to a real estate firm to put their cards in the window and to use any part of the premises any time of the day they wished, the tenant retaining sole control of the whole of the premises, and the real estate firm paying no rent, having no key nor the exclusive use or possession of any part of the premises, did not amount to a sub-letting and was not a breach of the covenant against sub-letting without leave; *Woodfall*, 18th ed. p. 572.

(2) The plaintiff could not forfeit the lease for breach of a covenant to use no projecting signs, merely because of the continuance of the sign which he knew was there when he signed the lease. The covenant had no retroactive effect and was only binding on the tenant as to his future acts.

*Holman v. Knox*, (1912) 3 D.L.R. 207, followed.

(3) As the premises were to be used as a boot and shoe repairing shop with the express consent of the plaintiff, the subsequent carrying on therein of a shoe shining business, as an adjunct to the other business, should not, under the circumstances, be deemed to be a breach of the covenant to use the premises as a "store" only and not to carry on or permit to be carried on any other trade or business. Cobbling and shoe shining, being both mechanical operations wholly unconnected with the selling of goods, and so having no relation to a "store," are not different in principle, and, if one was permissible under the covenant, the other should be also.

Reference to authorities on the meaning of the word "store."

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(4) When a covenant in a lease, accompanied by a right of re-entry on breach, is so expressed that its meaning is doubtful, and the tenant in good faith has done what he supposed to be a performance of it, a forfeiture will not be enforced; the difficulty in construing the covenant is a special circumstance entitling the lessee to relief: *McLaren v. Kerr*, (1876) 39 U.C.R. 507, and *Wyndham v. Carew*, (1841) 2 Q.B. 317.

DECIDED: 2nd June, 1913.

**Statement.** APPLICATION under The Landlords and Tenants Act, R.S.M. 1902, c. 93, by Just, the landlord, to evict Stewart, the tenant, on the ground of forfeiture of his lease for breaches of covenant.

*E. T. Leech* for Just.

*J. J. McCready* for Stewart.

CURRAN, J. The lease in question in this case is in writing and under seal, is dated the 25th day of April, 1913, and is for a term of two years and eight days from the 19th day of March, 1913. The tenant was in possession for about a month before the lease was signed, which probably accounts for the term commencing on the 19th of March, whereas the lease was not made until the 25th of April following.

The lease purports to be made in pursuance of the Short Forms Act, and contains the usual statutory covenant on the part of the tenant against assigning or sub-letting without leave, and the following special covenants:

“And that the said lessee shall use and occupy the said premises as a store only, and will not carry on or permit to be carried on any other trade or business;

“And further that the said lessee shall use no projecting signs but only flat signs or window signs, and then only of such size and design as the lessor may approve of in writing.”

The lease contains the usual proviso for re-entry on non-performance of covenants, which is exercisable immediately on default being made.

The landlord claims that the tenant has committed

breaches of all three of these covenants, and accordingly, on the 9th of May instant, gave him written notice that on account of such breaches of covenant he declared the term forfeited and demanded possession of the premises.

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Judgment.  
CURRAN,  
J.

The tenant denies all breaches alleged, and refuses to give up possession, hence this application.

The breach of the covenant against sub-letting is alleged by the landlord to arise in virtue of a sub-letting to a real estate firm of Prior & Hales, of a part of the demised premises without his consent and against his will. He says that the tenant asked his permission for this sub-letting but was refused.

If it was in fact a sub-letting which took place, this would, under the circumstances, doubtless, work a forfeiture of the lease. The demised premises consist of the south half of the main floor of No. 483 Main Street in the City of Winnipeg. The store is divided from east to west by a partition down the centre; the entrance is wide and from it doors give access to each of these premises. The landlord, who occupies the north half himself, said that he does not know of any lease to Prior & Hales being made by the tenant; but that they were occupying the demised premises along with the tenant. The tenant denies that he ever leased any portion of the premises to Prior and Hales, but admits that he gave them permission to put their cards in the window and to use any part of the premises any time of the day they wished, but that he has the sole control of the premises in his own hands. There was some evidence that this real estate firm appeared to be doing some business on these premises. But I must hold upon the evidence that there was no actual sub-letting in the sense that these people became tenants of any part of the demised premises. They paid no rent, had no key and had not the exclusive use or possession of the whole or any part of the demised premises. They were, in my opinion, simply licensees and not tenants.

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Judgment.  
CURRAN,  
J.

The tenant retained possession and control of the whole of the premises, and merely permitted this firm to make use of them in conjunction with himself, but without parting with any of his own legal rights to the whole of the premises.

I refer to *Woodfall on Landlord and Tenant*, 18th edition, 572; *Peebles v. Crosthwaite*, (1897) 13 T.L.R. 38 and 198; *Mashiter v. Smith*, (1887) 3 T.L.R. 673.

I hold that there has been no breach of the tenant's covenant against assigning or sub-letting entitling the landlord to re-enter and forfeit the lease.

Next, it is claimed that there has been a breach of the covenant as to projecting signs. The evidence is that there is a wooden sign projecting some 10 feet from the building; that there are some 13 cards or flat signs nailed to the front of the building. The landlord says he did not assent to any of these signs being put up, and objects to them. The tenant says, and he is not contradicted in this, that the projecting sign was put up on April 4th, and the flat signs on April 15th, of course, before the lease was executed. The landlord admits that he knew some of the flat signs had been put up before the lease was granted, but won't say that he knew of the projecting sign. I think he did know. I do not see how he could have avoided seeing it, as it was a most conspicuous object, and I think when he got the tenant to sign the lease he was fully apprised of the situation as to these signs.

It is argued on behalf of the tenant that the lease must be considered not to have referred to these signs, and I think this contention is reasonable. I hold that the landlord accepted the situation as it then was when he granted the lease, and cannot now be heard to say that what was done before the lease was signed is a breach of this covenant. I think this covenant had no retroactive effect,



is only binding on the tenant as to future acts, and that there has been no breach of this covenant proved.

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Judgment.  
CURRAN,  
J.

If it were otherwise, a great hardship would be entailed on the tenant in forfeiting his lease on such ground, as I am satisfied that the signs were put up by him in good faith before he knew or could know that this was prohibited. The landlord should, in all honesty, have objected, if he ever intended to object, to these signs, before the lease was executed. As he did not do this and granted the lease with knowledge as to the signs, I think he has clearly waived any right to object now after the fact: *Holman v. Knox*, 3 D.L.R. 207.

In my opinion there has been no breach of this covenant by the tenant which would operate as a forfeiture of the lease.

There remains now to be considered the alleged breach of the covenant to use and occupy the premises as a store only, and not to carry on or permit to be carried on any other trade or business.

It is objected for the tenant that this covenant is meaningless. In *Bell's Landlord and Tenant*, 585, it is laid down:

"Where a covenant, accompanied by a right of re-entry on breach, is so expressed that its meaning is doubtful, and the tenant in good faith has done what he supposed to be a performance of it, a forfeiture will not be enforced; the difficulty in construing the covenant is a special circumstance entitling the defendant to relief."

The authority for this proposition of law is a case of *McLaren v. Kerr*, 39 U.C.R. 507.

I have looked at this case, and the above citation is taken from the text of the judgment of Harrison, C.J., and at the conclusion of the judgment I find this expression:

"The Courts always lean against forfeitures, and plaintiffs seeking to take advantage of forfeitures, knowing

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this, should be in such a position as to claim their rights without asking any favor from any Court."

In another case, *Doe d. Wyndham v. Carew*, 2 Q.B. 317, where a proviso in a lease which it was claimed gave rise to a forfeiture was very involved in its language and doubtful in its meaning, Lord Denman said, at p. 321: "I am of opinion that the Court is not bound to find out a meaning for a proviso framed as this is."

Now is the meaning of the covenant in question obscure or doubtful? It imposes two obligations, one positive to use and occupy the premises as a store only; the other negative not to carry on or permit to be carried on any other trade or business. The question is, what is meant by the expression "use the premises as a store only." Again, what trade or business is here meant, in the negative part of the covenant? Is the Court bound to find a meaning for this proviso, if it cannot easily be ascertained from the language used? I will endeavor to do so, although I think I might well have done as the Court did in the *Wyndham v. Carew* case, above referred to.

The *Century Dictionary* gives a variety of definitions of the word "store." Among them I find this: "A place where goods are kept for sale by either wholesale or retail; a shop, as a book-store, a dry-goods store." The word seems to be sometimes the equivalent of "shop," which is defined by the same authority as "A booth or stall where wares were usually both made and displayed for sale, hence a building or a room or suite of rooms appropriated to the selling of wares at retail; a room or building in which the making, preparing or repairing of any article is carried on, or in which any industry is pursued, as a machine shop, a barber shop, a carpenter's shop." This latter definition, however, refers particularly to the English word "shop," and may not be applicable in this country to the term "store." In *Words and Phrases*

*Judicially Defined*, vol. 7, p. 6672, "store" is defined as "any place where goods are sold either by wholesale or retail."

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J.

The breaches of this covenant assigned are: (1) that the tenant permitted the business of a real estate agent and of selling real estate to be carried on upon the premises; (2) that he carried on or permitted to be carried on the business of shoe shining on the premises.

As to the first of these alleged breaches the evidence does not bear out the allegation, even if there was a breach of the covenant. The landlord's contention must fail as to this allegation.

The fact of the second is admitted by the tenant; but he denies that it is a breach, and in any event claims that it was authorized or permitted by the landlord. I find that the landlord did authorize the tenant to do shoe-shining in connection with his repairing work, but that such permission did not go beyond that. At first the tenant restricted this branch of his business to the permission given, but finding it profitable enlarged his operations so as to serve the general public.

Now, it is admitted that the tenant rented the premises for the purpose of doing a boot and shoe repairing business and that he intended to put in a stock of boots and shoes for sale by retail in the usual way. This latter was not done. The tenant says shoe-shining is part and parcel of the business of repairing shoes, and is now generally recognized as a legitimate and usual part of such a business in the City of Winnipeg, and justifies his right to do such a business on this ground. I have no other evidence upon the point but that of the tenant.

It seems to me, however, that even the business of shoe repairing does not properly come within the terms of the covenant, having regard to the definitions of the word "store" referred to. I can see no difference in principle

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CURRAN,  
J.

between shoe repairing or cobbling, and shoe shining, that is as an occupation. The first may require more skill than the latter, but they are both mechanical occupations wholly unconnected with the selling of goods or merchandise. If cobbling is within the covenant, and so permissible, I think shoe shining is also within it. But in my opinion neither is, strictly speaking, within the covenant.

The landlord admits that there is no objection to shoe repairing on the premises, and indeed he could not object to that because the premises were in part rented for this express purpose. He impliedly admits that the covenant does not touch this class of business; to be consistent, how then can he object that the other class of business is prohibited by the covenant?

I think the landlord, who is himself only a lessee of the premises, is influenced to take these proceedings in consequence of the restriction as to shoe shining referred to in the letter, Exhibit 3, which is the consent of the owner to the sub-lease. It is possible the landlord's own tenancy may be in jeopardy on account of what his tenant is doing upon the premises in this respect, and it is to protect himself from a possible forfeiture of his lease that he takes this action. He must, however, rely upon the provisions of the lease which he himself caused to be prepared with his tenant; and, if the covenant in restriction of the business to be carried on upon the premises by the tenant is ineffective for the purpose of preventing the business of shoeshining from being there carried on, it is his own fault.

Upon the whole, I think the landlord has failed to meet the onus undoubtedly upon him to prove a breach of this covenant and, while I think the tenant, having seen the letter, Exhibit 3, knew that the superior landlord prohibited shoe shining on the premises, still he was not bound by that letter, but only by the terms of his lease. As the true construction of the covenant is doubtful, I

feel, but not without some hesitation, that I cannot hold that the tenant has committed the alleged breach.

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CURRAN,  
J.

The landlord has, therefore, in my opinion failed to prove the breaches assigned, and his application must be dismissed with costs.

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COURT OF APPEAL.

HERBERT V. VIVIAN.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*Principal and agent—Commission on sale of property—Vendor's refusal to complete—Consent of third person—Agent taking note for deposit in lieu of cash.*

If the lessee of a hotel has agreed to sell his interest to a purchaser ready, willing and able to complete the purchase, he will be liable to the agent who had procured the purchaser for the usual commission, although the vendor, not having been able to obtain, on terms satisfactory to him, the necessary assent of his lessor to the proposed sale, has refused to complete it.

The taking by the agent from the intending purchaser of a promissory note for the amount of his commission in lieu of a cash deposit on the purchase, without the knowledge of the vendor, is not in itself misconduct disentitling the agent to his commission, at all events, when the vendor has not set up any misconduct on the part of the agent in respect thereof.

DECIDED: 16th June, 1913.

ACTION to recover commission on sale of hotel property. Statement.

The following judgment at the trial was delivered by

METCALFE, J. The defendant is the lessee from one Graves of the building and premises known as the Vivian Hotel, situate in the city of Winnipeg, and is the owner of the chattels contained in the building. The plaintiffs are business brokers.

Prior to the 9th January, 1910, the plaintiff Herbert had occasionally spoken to the defendant about selling his

1913 hotel. The defendant was aware of the business of the  
Judgment. plaintiffs.

METCALFE, J. About the 9th December, 1910, one John T. Hanna called at the office of the plaintiffs with a view to purchasing a hotel. Herbert called to his attention several hotels listed in their office. None of these being suitable, he went to the Vivian Hotel and saw Mr. Vivian for the purpose of getting a price. Mr. Vivian quoted a price of \$20,000. The commission on that sum would be \$1,000.

Herbert subsequently saw Hanna and for the first time told him about the Vivian Hotel. Thereupon he and Hanna interviewed Vivian, and Hanna said that he would buy the hotel if Vivian would take Hanna's equity in certain house property at \$3,800. Vivian knew that Hanna did not have the cash himself, but he knew that certain wholesale men would advance cash to Hanna to purchase the hotel. He made enquiries as to the value of the equity in the house property and subsequently told Hanna that he was satisfied to take this property at \$3,800 on the hotel price.

At some time in the negotiations Hanna saw his brother, E. W. Hanna, hotel-keeper, Joseph Carroll, manager of the Wine & Spirit Vaults, and Patrick Shea, a brewer, and they were willing to advance the money necessary to complete the payments on the hotel, all of which was known to Vivian.

The parties being satisfied, Vivian told Herbert and Hanna that Graves, the lessor, would have to be satisfied with him as a tenant. Thereupon Herbert and Hanna attended and saw Graves, who told them that he was satisfied with Hanna as tenant, but that there was a little matter, which he did not explain further, between Vivian and Graves that would have to be arranged before he would consent to an assignment. Herbert and Hanna went back to Vivian and told Vivian that Graves was satisfied with Hanna as a tenant. Herbert also referred

to the other little matter, and Vivian told him that it was a personal matter and was none of Herbert's business.

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Vivian thereupon signed a document as follows:

METCALFE,  
J.

"December 9, 1910.

"Received from John T. Hanna, by my agents 'THE LOCATORS OF WINNIPEG,' a deposit of \$1,000 on the purchase price of the contents of the Vivian Hotel at \$20,000, I agreeing to accept, as part payment on such, a residence at 168 Walnut Street at \$5,000, subject to incumbrance of about \$1,200, and balance, about \$15,200, to be paid me in cash on date of possession, which is to be on or about January 20, 1911. Stock of liquors and cigars to be settled for by notes of equal amounts without interest at 30, 60 and 90 days from date of possession.

(Signed) "Albert Vivian."

It appears that the little personal matter between Graves and Vivian was some agreement between them that, in the event of the sale of the hotel business, Vivian was to pay Graves a percentage on the price; that such arrangement had been made between them on the execution of the lease and was a consideration by reason of which Vivian had obtained a lease for a considerable term, the unexpired term being of considerable value. All this, however, was not then disclosed either to Hanna or Herbert.

Graves, being about to leave for Ontario, left a consent to an assignment of the lease from Vivian to Hanna with his partner, such assignment to be delivered up only upon Vivian's carrying out his arrangement with Graves. Before Graves went East, Vivian saw him. Under the arrangement Vivian had to pay Graves some \$3,400 and, as Vivian puts it, "This was more than I expected."

Shortly after this Vivian told Herbert that he was not able to pay Graves, who wanted a large amount to assign the lease, and that he did not see how he could carry the deal through, considering the amount he had to pay Graves.

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METCALFE,  
J.

About this time Mr. Hubbard, a lawyer, was brought into the deal on behalf of Vivian. Hubbard at once tried to get Hanna to put up all, or some portion of this \$3,400. This Hanna refused to do. Hubbard admits that he did considerable "bluffing" in connection with the matter.

On the 22nd December Messrs. Phillipps & Whitla, who were acting for Hanna, wrote Hubbard as follows:

"Re Vivian and Hanna.

"In reference to our telephone message of last evening in which you stated that Mr. Vivian had not signed any agreement with Hanna and that he was being held up by the landlord for a bonus before the assignment in favor of Hanna could be approved, we beg to state that so far as we are concerned, acting for Mr. Hanna, we rely upon the agreement signed by Mr. Herbert, of The Locators, who acted as Mr. Vivian's agent, acknowledging receipt of \$1,000 and setting forth the terms of the sale. We have also seen a letter signed by Mr. Vivian in which he acknowledges that Mr. Herbert was his agent in connection with this sale. This being the case, we have paid a deposit and we have received an agreement in writing which is enforceable. We, therefore, look to Mr. Vivian to carry out his agreement. With Mr. Graves we have nothing whatever to do."

On the 23rd of December Hubbard wrote to Phillipps & Whitla, as follows:

"Re Vivian and Hanna.

"Your letter of the 22nd inst. duly received.

"Mr. Vivian, we are instructed, never gave Mr. Herbert or The Locators, any authority to sell, or in any event only on terms which were specified to them, and which must have been brought to the notice of your client, if as you claim you have seen a letter signed by Mr. Vivian. Our client never gave any authority to Mr. Herbert to sign any agreement and will of course refuse to ratify any agreement that Herbert may have made, and we are to-day notifying The Locators, who are the only persons with whom Mr. Vivian has had any dealings whatsoever in the matter, to the effect that any authority that may have been received by them is re-



scinded. The only dealing which our client had with Mr. Herbert was as a member of The Locator firm, and he well knew that Mr. Vivian was not the owner of the hotel in question, and that any sale of the business was subject to the approval of the lessor."

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J.

On the same day Vivian, by his solicitor Hubbard, wrote to The Locators, as follows:

"Take notice that any authority which may ever have been given by me to you to sell the chattels and effects of the Vivian Hotel, or to act as my agents in any connection therewith, is hereby determined and at an end, and that I will refuse to recognize any act of yours done or purporting to be done as my agent."

I am inclined to the view that the acts of Vivian and Hubbard were such as justified Hanna in coming to the conclusion that they did not intend to carry out the contract. Although they subsequently intimated that they would carry out the contract, Hanna, in the meantime, had made other arrangements, and the deal was off.

It is true that the plaintiffs did not disclose to Vivian that the \$1,000 was not received in cash. They took Hanna's note for that amount, and justify this on the ground that that \$1,000 was the amount of their commission, and that they took their own chances on the payment of the note. In any event, the defendant has not set up any misconduct on the part of the agents by reason of this act or its non-disclosure.

I think the plaintiffs found for the defendant a purchaser ready and willing and able. The purchaser was satisfactory to the defendant. Subsequently, through the fault of the defendant, and through no fault of the plaintiffs, the deal went off.

There will be judgment for the plaintiffs for \$1,000 and costs.

Defendant appealed.

*H. M. Hannesson* for defendant.

*C. P. Wilson, K.C.*, and *W. C. Hamilton* for plaintiffs.

1913 THE COURT dismissed the appeal without calling on Judgment. respondent's counsel.

[Appealed to the Supreme Court.—Ed.]

### BENSON V. HUTCHINGS.

Before METCALFE, J.

*Evidence—Collateral verbal agreement—Cheque on Bank—Counterclaim.*

Plaintiffs' testator, in negotiating the sale of his property to a syndicate of which the defendant was one, promised to pay him \$1,800 for his services in organizing the syndicate if the sale should be completed for the sum agreed on. The syndicate of five members was formed by defendant and all joined in the mortgage given for part of the purchase money, but the property was transferred to the defendant alone. On closing the purchase, the defendant handed over two cheques, one for \$1,800 and the other for the balance of the cash payment, at the same time asking the deceased to indorse the \$1,800 cheque back to him. The deceased said "I will see you later," but failed to return the cheque. Defendant, becoming suspicious, stopped payment of it.

*Held*, (1) That parol evidence was admissible to prove the agreement by deceased to pay the \$1,800, since it was not evidence to contradict or vary any written document.

(2) That, while plaintiffs were entitled to judgment on the cheque, the defendant must succeed on his counterclaim for a like amount, as his evidence was sufficiently corroborated.

No costs to either party.

DECIDED: 18th June, 1913.

*Statement.* ACTION by the executors of John R. Benson to recover the amount due on a cheque given by the defendant, the payment of which had been stopped. Counterclaim for the amount of the cheque, upon an agreement with the testator.

C. P. Wilson, K.C., and H. Mackenzie for the plaintiffs.

J. H. Leech, K.C., for the defendant.

METCALFE, J. John R. Benson, in his lifetime, was the owner of property at the corner of McDermot Avenue and Rorie Street in Winnipeg. Being desirous of selling the

same, he interviewed Mr. E. F. Hutchings, with whom he had been acquainted many years. He told Hutchings that he wanted \$1,200 a front foot for his property. He had with him and produced a blue print of the plan. Together they figured an equitable adjustment of the frontage, and at \$1,200 this came to \$136,800.

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METCALFE,  
J.

Hutchings told Benson that he would not buy it himself, but that it was possible he could form a syndicate of five, of which he himself would be one; that it would be worth something to form such a syndicate and carry the deal through; that he was a busy man himself and could not attend to the detail work of the same; but that if Benson would allow him \$1,800 he would employ some one to look after the details, and would try and form the syndicate to purchase the property. Hutchings mentioned some names as other possible members of the syndicate. Benson favored Hutchings' suggestion and agreed to pay him \$1,800 if he could syndicate the property. Hutchings arranged with one Forlong to do the detail work in forming the syndicate, he and Forlong to participate in the \$1,800; but it does not appear that it was agreed at that time in just what proportion the \$1,800 was to be divided.

Forlong then procured an option from Benson to Hutchings at the price of \$136,800. He then formed the syndicate. Later the property was transferred to Hutchings. Throughout the negotiations Benson knew that Hutchings was acting on behalf of the syndicate. Although the property was transferred to Hutchings a mortgage was taken back from the five members of the syndicate. The mortgage was for \$100,000.

At the time of the delivery of the transfer and the mortgage the balance of the price was paid by the cheques of Hutchings, one for \$35,000, and one for \$1,800. Hutchings says that on leaving the office of the solicitors he asked Benson to endorse back to him the cheque for

1913      \$1,800; but Benson said "I will see you later," then  
Judgment.      making an appointment which Benson did not keep.  
METCALFE,      Whereupon Hutchings, becoming suspicious, stopped pay-  
J.      ment of the \$1,800 cheque.

The action was brought by Benson on the cheque. The defendant counterclaimed for the payment of the \$1,800. Subsequently Benson died. By order of revivor his executors are parties.

I have no doubt that Benson agreed to pay Hutchings the \$1,800. There is evidence to corroborate Hutchings. I think there must be judgment for the plaintiffs on the cheque.

As to the counterclaim, counsel for the plaintiff argues that the evidence of the verbal agreement ought not to be received, urging that it is in variation or contradiction of the written contract wherein the price is expressed to be \$136,800. No authority is necessary for the proposition that evidence may not be admitted of an oral agreement to contradict or vary a written document.

If this were a sale in fact from Benson to Hutchings and no services were to be performed, it may be that the defendant could not recover for an allowance on purchase price not expressed in the written contract.

In so far as this action is concerned, as there were services to be performed for which Benson agreed to pay, I think verbal testimony of such contract is admissible and that the defendant may recover on his counterclaim.

There will be judgment for the plaintiffs for \$1,800 and judgment for the defendant on his counterclaim for \$1,800.

Following the ordinary course there would be costs to each party following these events. But, as these would very likely about equalize, and after consultation with counsel, I allow no costs to either party.

## CITY OF WINNIPEG V. WINNIPEG ELEC. RY. CO.

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Before MATHERS, C.J.K.B.

*Costs—Discovery—Examination of past officer of plaintiff corporation—  
Unnecessary proceeding.*

The defendants obtained discovery in the course of the action by examining the plaintiffs' engineer, as an officer, and by the plaintiffs' affidavit on production. In addition, they examined, out of the jurisdiction, R., a past officer of the plaintiffs, and afterwards called him as a witness at the trial. No part of his examination for discovery was used at the trial, nor did the defendants apply for leave to use it.

*Held*, that defendants' application for a fiat to tax against the plaintiffs the costs of examining R. for discovery, should be refused.

DECIDED: 18th January, 1913.

APPLICATION by the defendants for a fiat to tax the costs of examining for discovery S. H. Reynolds, a past officer of the plaintiffs out of the jurisdiction. Statement.

*J. Preudhomme* for plaintiffs.

*D. H. Laird*, for defendants.

MATHERS, C.J.K.B. By the examination of the officer named the defendants obtained no material discovery that they had not already obtained by the examination for the same purpose of the City Engineer and by the plaintiff's affidavit on production. No part of the examination was used at the trial, nor did the defendants apply for leave to use it. On the other hand they brought Mr. Reynolds here and called him as a witness at the trial. It is said, that, by the examination, the defendants discovered that he could give material evidence in their favor, but there is nothing to show that they could not have ascertained this fact without the expense of an examination on oath. In taking this proceeding the defendants appear to have acted *ex abundanti cautela*. *Prima facie* they are not entitled to tax these costs against the plaintiff, and in my opinion they have not satisfied the onus upon them of making a case for a fiat. The application is refused.

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## WATTS v. ROBERTSON.

Before MACDONALD, J.

*Principal and agent—Agreement for exchange of farm for city property beneficially owned by agents—Action by nominal owner for specific performance—Fraud—Costs.*

In an action for specific performance of an agreement for the exchange of city property standing in the name of the plaintiff for a farm owned by the defendant.

*Held*, that two land brokers doing business in partnership, who were the real owners of the city property referred to, were, upon the evidence, the defendant's agents for the sale of the farm, and, as such, were bound to disclose their identity as the actual principals in the agreement made with the plaintiff; and, as they had not done so, but concealed the fact, the action should be dismissed, with costs, to be taxed free from the statutory limitation.

*Held*, also, that the agents, though not parties to the action, should be ordered to pay the defendant's costs in case they should not be paid by the plaintiff.

DECIDED: 5th February, 1913.

**Statement.** THE defendant was the owner of farm lands, and the plaintiff was the owner of a house and lot, No. 225 Atlantic avenue, Winnipeg. In September, 1912, they agreed to exchange these properties. The plaintiff was to construct a store front addition to the house in Atlantic avenue, and he was to pay the sum of \$1,500 into a chartered bank, upon which cheques could be issued for the erection of the addition.

The plaintiff did construct the addition, and brought this action for specific performance of the contract, as the defendant had refused to perform his part.

The defence raised was that the defendant, in July, 1912, listed his farm with M. A. Davis and R. B. McGreevy, real estate agents, for sale at \$30 an acre; that, in the month of September, 1912, Davis and McGreevy, as such agents of the defendant, represented to him that they had found a purchaser for the land, and that the plaintiff would purchase the property upon certain terms, which terms were never agreed to. The defendant alleged that the representations were false to

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Statement.

the knowledge of Davis and McGreevy; and that the plaintiff never agreed to purchase the lands; that the sale referred to was only a pretended sale, and that the real purchasers of the lands were Davis and McGreevy, or one of them, which fact was concealed from the defendant; that the plaintiff was not really the owner of the Winnipeg property, but simply held the same in trust for Davis and McGreevy, and that he was not in a position to make a transfer of the same.

The defendant, therefore, asked that the plaintiff's action be dismissed, and that the caveats filed by him be vacated and discharged.

*J. B. Coyne* and *J. Galloway* for plaintiff cited *Fuller v. Benett*, 2 Hare, 404; *Lane v. Rice*, 18 W.L.R. 557; *Hannah v. Graham*, 17 M.R. 532; — *v. Walford*, 4 Russ. 375; *McCreight v. Foster*, L.R. 5 Ch. 604; *Tasker v. Small*, 3 Myl. & Cr. 63; *Wood v. White*, 4 Myl. & Cr. 460, and *Re Sturmer & Beaverton*, 21 O.W.R. 390.

*J. P. Foley* and *N. A. McMillan* for defendant cited *Dunne v. English*, L.R. 18 Eq. 524; *Wolfson v. Oldfield*, 22 M.R. 159; *Clermont v. Tasburgh*, 1 Jacob & Walker, 112; *Henderson v. Thompson*, 41 S.C.R. 445; *McPherson v. Watt*, 3 A.C. 254; *Hesse v. Briant*, 6 De G. M. & G. 629; *Sharpe v. Foy*, L.R. 4 Ch. 35, and *Re Sturmer & Beaverton*, 20 O.W.R. 560; 21 O.W.R. 55, 360.

MACDONALD, J. The defendant, being the owner of a farm near Baldur in Manitoba, placed it for sale in the hands of Davis and McGreevy, a real estate firm doing business in Winnipeg. This firm deny that they had the farm for sale, and say that they were the owners of the city property which they were exchanging with the defendant for his farm, and were acting as principals and not as agents for the sale of the farm. They further state that they never represented the plaintiff as

1913      the owner, and cannot account for the defendant's know-  
Judgment. ledge of the plaintiff's connection with the city property.  
MACDONALD, I find, without hesitation, that Davis & McGreevy were  
J.      the selling agents of the defendant and, as such, were  
under a duty to disclose their identity as actual prin-  
cipals. They did not do so. On the contrary, they  
resorted to every possible artifice to conceal that fact.

They were not at arm's length. The defendant was induced to reduce the price of his farm from \$28.00 per acre to \$27.00 per acre because of the misrepresentation of his agents that the plaintiff, on looking over the farm, discovered that it was dirty and the buildings in bad repair and that he would not enter into the contract unless the price was reduced, whereas the plaintiff was never on the farm, and, as he himself admits, had no interest in the transaction. The City property was in his name for the convenience of Davis & McGreevy.

The defendant is a poor business man, a very slow thinker, and, I would judge, very confiding. It is reasonable to suppose that, had he known that the plaintiff was not the principal, and that his own agents were the principals, he would have entertained a different feeling toward the business being negotiated. Thinking that Davis & McGreevy were his agents he would naturally feel some protection by way of straightforward, honest treatment, as there would be no incentive to them to act otherwise.

The conduct of these men, under all the circumstances, seems to me inexcusable, and cannot be too severely condemned.

They were the agents of the defendant, and were charging him a commission, and were in duty bound to protect him in every way possible, instead of which they resort to deceit and falsehood of the most reprehensible character.



Specific performance will be refused, and the action dismissed with costs. Such costs to be taxed without the statutory limitation and, failing payment of such costs by the plaintiff, the same to be paid by Davis & McGreevy.

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Judgment.  
MACDONALD,  
J.

All transfers, deeds and agreements executed by the defendant to be delivered up and cancelled.

## COURT OF APPEAL.

### CLARK V. LAING.

Before HOWELL, C.J.M., PERDUE, CAMERON and HAGGART, J.J.A.

*Jury trial—When ordered—King's Bench Act, R.S.M. 1902, c. 40, s. 59 (b)—Action for damages for injury caused by alleged negligence.*

This action was for damages for personal injuries caused by the alleged negligence of the defendant in running with his automobile on the wrong side of the road into the plaintiff on his motor cycle.

The defendant disputed the alleged negligence. The collision caused serious injury to the plaintiff.

On his application the Referee made an order, under sub-section (b) of section 59 of the King's Bench Act, for trial of the action by a jury and a Judge affirmed this order on appeal.

Defendant appealed to this Court.

*Held*, that the discretion of the Judge should not be interfered with and the appeal should be dismissed with costs to the plaintiff in the cause.

*Navarro v. Radford-Wright Co.*, (1912) 22 M.R. 703, explained.

DECIDED: 17th March, 1913.

PLAINTIFF brought this action to recover damages for personal injuries and damage to his motor cycle caused, as he alleged, by the negligence of the defendant running into him when defendant was driving his automobile on the wrong side of the road.

Statement.

The defence set up was that the plaintiff was himself on the wrong side of the road. A doctor's report showed that the plaintiff had sustained injuries, fractured wrist, a bruised knee and a broken rib and was in the hospital altogether one month.

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Statement.

The Referee made an order for trial of the action by a jury. On appeal to Macdonald, J., the appeal was dismissed. The defendant then appealed to the Court of Appeal.

*H. J. Symington* for defendant.

*M. G. Macneil* for plaintiff.

The judgment of the Court was delivered by

HOWELL, C.J.M. On the argument of this case the judgment of Mr. Justice Galt in the case of *Jocelyn v. Sutherland*, *post*, was referred to. I gather from the learned Judge's remarks that he took a view of the case of *Navarro v. Radford-Wright Co.*, 22 M.R., 703, not intended by the Court. In the latter case, Mr. Justice Metcalfe, who made the order therein appealed from, thought the case one in which an order should be made for a jury, if, in addition to the facts set forth, the plaintiff had shown a case of serious injury.

This Court thought that in the material put in the plaintiff had set forth facts from which it might reasonably be found that the plaintiff had been seriously injured and, having come to this conclusion, and agreeing with Mr. Justice Metcalfe that in other respects a case had been made out for the order, the case was disposed of as reported.

The appeal is dismissed with costs to the plaintiff in the cause.

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## COURT OF APPEAL.

JOCELYN V. SUTHERLAND.

Before HOWELL, C.J.M., PERDUE, CAMERON and HAGGART, J.J.A.

*Jury trial—When ordered—King's Bench Act, R.S.M. 1902, c. 40, s. 59 (b)—Action for damages for injury caused by negligence.*

In an action for damages for an injury caused by defendants' alleged negligence, a trial by jury will be ordered, under sub-section (b) of section 59 of the King's Bench Act, R.S.M. 1902, c. 40, if the Judge is satisfied upon the material filed that the injury was serious and that the damages in case of success would be substantial.

*Navarro v. Radford-Wright Co.*, (1912) 22 M.R. 703, followed.

APPEAL from a decision of Galt, J., dismissing an **Statement.** appeal from an order of the Referee that the case be tried by a jury.

27th February, 1913.

The following judgment was delivered by

GALT, J. I regret that, owing to the press of other matters, I have not the time to consider more fully the authorities cited.

But whatever my own views on this matter may be, I am bound by and ought loyally to follow what I find laid down by the Court of Appeal in *Navarro v. Radford-Wright Co.*, 22 M.R. 730. Chief Justice Howell there says:

"The learned Judge informed me that he thought it was a case which might well be tried by a jury, if the plaintiff had satisfied him that the injury which he sustained was of a serious character. . . . The reason for his refusing the order was that he was not satisfied that the plaintiff had set forth such facts that if he succeeded the damages would be substantial."

I regard that as a practical decision that if the damages are substantial, that is a proper case for trial by a jury and the plaintiff is entitled to obtain it. The plaintiff says here that his physician told him he would suffer from disabilities for the rest of his life. He was in the

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Judgment.  
GALT,  
J.

hospital 21 weeks. In the *Navarro* case he was there only 20 days. In that case it is true, as Mr. Coyne points out, there was semi-paralysis affecting his arm and leg. I cannot help feeling it would be idle to say that where a man is run into by an automobile and confined for 21 weeks in the hospital and there is a continuance of weakness, he is not *prima facie* entitled to substantial damages if the defendant is in the wrong.

The *Navarro* case practically makes it a rule of law in this Province that where the injury is serious, and the damages in case of success would be substantial, the plaintiff is entitled to a trial by a jury. For this reason, the appeal is dismissed with costs.

Defendant appealed.

*J. B. Coyne* for defendant.

*W. H. Curle* for plaintiff.

25th March, 1913.

THE COURT dismissed the appeal with costs, holding that the facts in the case justified an order for a jury as in *Clark v. Lang*, *supra*.

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### SIMONSON V. CANADIAN NORTHERN RAILWAY.

Before THE REFEREE.

*Practice—Notice of trial—Jury trial—King's Bench Act, s. 59—Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178.*

If the action is not one of those which, under section 59 of the King's Bench Act, can be tried by a jury without an order of a Judge made under sub-section (b) of that section, it is irregular for a party to give notice of trial of the action for an assize at which only jury cases are heard without first obtaining such an order, and such notice so given should be set aside on application of the opposite party, unless an order for a jury is obtained and served not later than the last day for giving notice of trial for that assize.

The expression, "The Workmen's Compensation for Injuries Act," in section 59 refers to the Manitoba statute so entitled; and, though an action may appear to have been brought under a similar Act of another Province, where the cause of action arose, that does not bring it within the class of cases which may be tried by a jury without an order.

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DECIDED: 19th June, 1913.

APPLICATION by defendants to set aside the notice of trial served by plaintiff for the summer assizes commencing 24th June, at which only jury cases are to be tried, on the ground that no order for the trial of the action by a jury had been obtained and that the action was not one which, under section 59 of the King's Bench Act, could be tried by a jury without such an order. Statement.

*D. A. Stacpoole* for plaintiff.

*C. W. Jackson* for defendants.

THE REFEREE. This is an action against the defendant Railway Company in respect of an injury which occurred in the Province of Saskatchewan and the statement of claim is based upon the legislation in that Province analogous to The Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178. The plaintiff's solicitor had given notice of the trial of the action before a judge and jury for the assizes commencing on the 24th June, instant.

The action was not one of those which, under section 59 of the King's Bench Act, must be tried by a jury "unless the parties in person or by their solicitors expressly waive such trial."

I think the expression "The Workmen's Compensation for Injuries Act" has reference only to the statute so entitled, namely chapter 178 of the Revised Statutes of Manitoba, 1902.

At the time of the service of the notice of trial, no order for the trial of the action by a jury had been made as provided for in sub-section (b) of section 59, and I think it is not competent for the plaintiff to serve his

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Judgment.  
THE  
REFEREE.

notice for trial of such an action by a jury unless he has obtained an order for a trial by jury. The defendant, in my opinion, is entitled to know absolutely if the case will come on for trial at the time specified in the notice and this would not be possible in a case where he is uncertain whether the plaintiff could procure such an order.

The plaintiff did procure an order for the trial of the action by a jury, but only to-day, and, in my opinion, it is too late to support the notice of trial previously served.

The order, therefore, will be that the notice of trial will be set aside, with costs in the cause to the defendants in any event.

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## COURT OF APPEAL.

### RE MACDONALD ELECTION.

Before HOWELL, C.J.M., RICHARDS and PERDUE, J.J.A.

*Election petition—Preliminary objections—Status of petitioner—Proof of his right to vote—R.S.C. 1906, c. 6, ss. 14, 18, 269—Misnomer—Identity—Pleading—R.S.C. 1906, c. 7, ss. 6, 11, 12, 17, 18, 19—Affidavit—Service of petition—Waiver—Notice of presentation of petition—Demurrer—Intimidation—Freedom of election.*

Hearing of preliminary objections to an election petition filed under the Dominion Controverted Elections Act, R.S.C. 1906, c. 7.

The following points were decided:

- (1) The status of the petitioners and their right to vote at the election in question were sufficiently proved by the production of a copy of the original list of voters bearing the imprint of the King's Printer: R.S.C. 1906, c. 6, ss. 14, 18.
- Re Provencher Election*, (1901) 13 M.R. 444, and *Re Provencher Election*, (1912) 22 M.R. at p. 22, followed.
- (2) The transposition in the printed list of the given name of one of the petitioners was a matter of no importance, as his identity was proved by his own evidence.
- (3) The precise words of complaint prescribed by section 11 of The Dominion Controverted Elections Act need not be used in the petition if the words used convey the same meaning.
- (4) An objection that the affidavit of the petitioner required by section 6 was sworn to some days before the filing of the petition is of no force.

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- (5) The evidence of the service of the petition, the notice of the security given and the notice of presentation was ample to show that sections 17 and 18 of the Act had been fully complied with; but, if not, the respondent by filing preliminary objections which he could do, under section 19, only within five days after the *service of the petition* upon him, and by filing a cross petition which he could do under sub-section 2 of section 12 only within fifteen days after *service of the petition*, should be held to have waived any irregularities in the service.
- (6) It is proper to dispose of a question as to the sufficiency in law of allegations in the petition on the hearing of preliminary objections. *Re Lisgar Election*, (1906) 16 M.R. 249, followed.
- (7) An allegation that by the arrest of certain persons and the communication of certain threats and statements, electors entitled to vote at the election were intimidated and frightened and prevented from soliciting votes for R. at the election and from advocating his candidature, and refrained from so doing and from casting their votes at said election, is good in law, in view of the very wide and inclusive provisions of section 269 of the Dominion Elections Act, and because, independently of any statute, freedom of election is, at Common Law, essential to the validity of an election.
- North Louth Case*, (1911) 6 O.M. and H. at p. 172, and *South Meath Case*, (1892) 4 O.M. and H. 142, followed.

DECIDED: 20th June, 1913.

HEARING of preliminary objections taken to the petition presented herein under The Dominion Controverted Elections Act, R.S.C. 1906, c. 7. Statement.

The following judgment, on the hearing of the application, was delivered by

CAMERON, J.A. Some nineteen different preliminary objections and grounds of insufficiency against the petition herein and the petitioners and the notice of presentation and the security given were taken and filed, but comparatively few of them were pressed in argument after the evidence had been given.

The first objection taken is that the petitioners are not, nor is either of them, a person or persons who had a right to vote at the election to which the petition relates. Former decisions on this point (as on other matters raised by preliminary objections) tended to throw formidable technical obstacles in the way of petitioners, as if there

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CAMERON,  
J.A.

could be deduced from the statutes an intention on the part of Parliament that, while petitions against sitting members could be filed with the utmost freedom, they were not to be brought to trial except on compliance with conditions of the most onerous and expensive kind. Rule 60 of the Parliamentary Election Petition rules of 1868, providing that no proceedings should be defeated by any formal objection, certainly did not warrant such a deduction and later decisions have had a tendency to relax the severity of these conditions.

Formerly the status of the petitioner could only be established by the production of a certified copy of the voters' list actually used at the poll in the polling subdivision in which the petitioner was entitled to vote: *Re Richelieu*, 21 S.C.R. 158. But, afterwards, in *Re Provencher*, 13 M.R. 482, it was held by Mr. Justice Bain, in view of changes in the legislation, that, if the elector's name appears on the original list of voters, he has a right to vote, and every copy of that original list with the imprint of the Queen's Printer is an authentic copy of the original list for all purposes under the provisions of the Franchise Act then in force. That legislation is now to be found in The Dominion Elections Act, R.S.C. 1906, c. 6, ss. 14, 18. Here the names of the petitioners are to be found in the lists printed by the King's Printer and authenticated by his imprint and also, as appears by reference thereto, in the original list. I refer to the judgment of Mr. Justice Perdue in *Re Provencher*, 22 M.R. at p. 22. If the imprint be an authentic copy of the original for all purposes, as the statute expressly says it is, it does seem to me that the production of it should be sufficient by itself. But much more than that was shown here, and the right to vote of both the petitioners was fully made out.

Some objection was urged against the petitioner Woods, whose given name appears to be transposed in the printed



voters' list. I can attach no importance to this, as there is no doubt whatever as to the identity of the petitioner who appeared and gave evidence with the person intended to be named in the voters' list.

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Judgment.  
CAMERON,  
J.A.

I can see nothing in the objection that the precise words of complaint, specified in sec. 11 of cap. 7, have not been used, where other words appear conveying the same meaning. And, in my judgment, the affidavits required by sec. 6 were duly sworn by both the petitioners as was amply shown by the evidence. The objection that the affidavits were sworn on November 14th, while the petition was not filed until November 18th, must fail in view of the established practice and of the manifest impossibility of literally complying with the wording of section 7, if this objection be well-founded. The object clearly aimed at by the statutory provision has been fully attained, and the provision duly complied with. It was argued that service of the petition upon the respondent was not sufficiently established. It is required that "notice of the presentation of a petition under this Act, and of the security, accompanied with a copy of the petition, shall \* \* \* be served on the respondent" (sec. 18, cap. 7). It is not a duplicate original of the petition, but a copy of it, that is to be served and, so far as I can see, there is no need to serve a duplicate original or a copy of the affidavit prescribed by section 6. But, if it is here really necessary for the petitioners affirmatively to establish that they have scrupulously complied in every imaginable particular with the requirements of the statute as to service, then it must be said that there is revealed a singular and anomalous provision of law. What have we here? We have here the respondent who has presented preliminary objections against the petition and petitioners, which he can only do, under section 19, within so many days "after the service of the petition and the accompanying notice" upon him. And, more than that, we have here a

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J.A.

cross-petition against the opposing candidate, filed by the respondent, which he can only do under the provisions of subsection 2 of section 12 "not later than fifteen days after service of such petition against his election." In these circumstances it seems incredible that the petitioners should be called upon positively to establish the service required by sections 17 and 18. But, taking it that they are so called upon, I have no hesitation in holding that what was shown in the evidence with respect to the service of the notice of presentation of the petition, of the security and of the petition, was amply sufficient to show that the provisions of the Act were fully complied with.

I must hold against the respondent on the objection as to the security. That objection has already been taken and overruled in this Province. I consider the notice of presentation, which is in the usual form, as sufficient.

Some other objections were urged, but these seem to me of an unimportant and formal character, to which it is impossible for me to attach any weight.

Paragraph 21 of the petition was objected to as being bad in law, and containing no allegations that furnish grounds for relief. Some doubt was expressed as to whether it were proper to dispose of a demurrer on this application. That, however, seems to have been the course adopted in *Re Lisgar*, 16 M.R. 249. The paragraph in question is lengthy and somewhat involved. The objection taken by respondent's counsel to it is that the allegations therein contained are in reality directed against the intimidation, by certain persons mentioned, of electors to prevent them from canvassing and soliciting voters (which is not expressly forbidden by sec. 269 of cap. 6) and not against intimidation preventing the voters themselves from voting. I extract the following from the paragraph as embodying its gist:

"By reason of the arrest of the aforementioned persons and the communication of said threats and statements,

electors entitled to vote at said election were intimidated and frightened and prevented from soliciting votes at said election for the election of or advocating the candidature of said Robert Lorne Richardson and they refrained from soliciting votes at said election for the election of said Robert Lorne Richardson, and refrained from advocating the candidature of said Robert Lorne Richardson, and refrained from casting their votes at said election, whereby the said respondent was and is incapacitated from serving in Parliament for the said electoral district and the said election and return of the said respondent were and are wholly null and void."

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CAMERON,  
J.A.

It is to be observed that the above quotation goes further than a mere allegation of intimidation preventing canvassing and states that electors, by reason of the facts stated, refrained from casting their votes.

Section 269 of chapter 6, R.S.C. 1906, deals with undue influence and intimidation and is very wide in its terms. Any one who "impedes, prevents or otherwise interferes with the free exercise of the franchise of any voter \* \* shall be deemed to have committed the offence of undue influence." Apart from the statute altogether freedom of election is at Common Law essential to the validity of an election. If this freedom be by any means prevented generally, the election is void at Common Law. And there is no question of agency involved. *Rogers on Elections*, vol. 2, p. 864, says:

"Intimidation operates on the mind of the intimidated; and, when this influence pervades the electors to such an extent as to render the action of the constituency other than free, the election held under such circumstances is void and of no effect at Common Law, irrespective of any question of agency between the authors of the intimidation and the candidate in whose interest it has been exercised." The *North Louth case* (decided in 1911), 6 O'M. & H. at p. 172.

"It is a mistake to suppose that, where general undue influence exists, it must be further shown that the result of the election was, in fact, affected thereby. It is enough

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J.A.

to show such general undue influence as may be reasonably believed to have affected the result." *South Meath*, 4 O'M. & H. 142.

The question goes to the point whether it can or cannot be said that the polling was a fair representation of the feeling of the constituency: *North Durham*, 2 O'M. & H. 156; *Fraser on Parliamentary Elections*, 126. Now, I have not observed a case in the reports where the charge was that there had been intimidation of electors who were workers, speakers and canvassers, to prevent them acting as such. But, if we suppose a case of a contested election where, by threats, undue influence and menaces, the canvassers and workers on one side were effectually excluded from taking part in the election, while at the same time the electoral district is overrun with the workers, agents and orators of the other side, then I think it might well be urged that, as free and full discussion is the basis of representative government, any attempts to curtail or destroy it would be discountenanced by the Courts, and that an election held in those circumstances was not free and fair, and was therefore void at Common Law, if such threats and undue influence could be reasonably held to have affected the result. It must be kept in mind that the "Common Law is a living force, and can apply itself to new mischiefs as they spring up," as was said in the *North Louth case*, at p. 137. But in the questioned paragraph we find an express allegation that electors refrained from voting by reason of the facts and threats mentioned therein, so that, in dealing with this objection, I need go no further than that. I must refuse, therefore, to strike out the paragraph in question.

I must overrule the objections taken and order the costs of and incidental to the disposal of them to be costs to the petitioners, to be paid by the respondent in any event of the cause.

The respondent to the petition appealed.

*F. M. Burbidge* for appellant.

*A. B. Hudson* for respondents.

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**Argument.**

After some argument the Court allowed the appeal to be withdrawn by consent.

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### RE DION.

Before MACDONALD, J.

*Will—Inconsistent provisions in will—Devise of particular property to A followed by general devise of all property to B—Originating notice—The Manitoba Trustee Act, R.S.M. 1902, c.170, s.42—King's Bench Act, Rule 994—Proceedings to obtain construction of a will—Practice.*

The will which the Judge was asked to construe contained, in clause 3, a devise of a particularly described property to A, in clause 4, a devise of another particularly described property to B and, in clause 5, a gift to B of "all the real and personal property or estate to which I shall be entitled at the time of my decease."

*Held*, that the devise to A was not in any way affected by clause 5 of the will which should be treated as only a gift to B of all the residue of the estate after the specific devises in clauses 3 and 4.

If there is an express contradiction between two clauses in a will the second clause must take effect over the first one, but there was not here any contradiction or repugnancy between clauses 3 and 5, especially in view of clause 4.

It is a settled rule in the construction of a will not to disturb a prior devise further than is absolutely necessary for the purpose of giving effect to the posterior qualifying disposition: *Jarman on Wills*, 569.

The construction of a will may be determined in a proceeding by originating notice under Rule 994, added to the King's Bench Act by 3 Geo. V, c. 12, s. 10.

*Re Sherlock*, (1897) 18 P.R. 6; *Re Whitty*, (1899) 30 O.R. 300; *Re Lacasse*, (1913) 9 D.L.R. 831, and *Re Rally*, (1911) 25 O.L.R. 112, followed.

*Semble*. There is no power in the Court, upon a petition under section 42 of The Manitoba Trustee Act, R.S.M. 1902, c. 170, to determine the rights of the parties or any party under a will, or to give its opinion for the guidance of trustees, the object of that section being only to obtain advice or directions as to unimportant matters of discretion, &c. See cases collected in 17 C.L.T. 287.

DECIDED: 21st June, 1913.

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Statement.

MOTION on behalf of the executors of the estate of the late Charles Dion, deceased, under originating notice under Rule 994 added to The King's Bench Act by 3 Geo. V, c. 12, s. 10, for an order determining a question arising upon the construction of the will and for the opinion, advice or direction of the Court upon questions arising on the said will.

*H. P. Blackwood* for executors.

MACDONALD, J. Prior to the passing of Rule 994 applications were made by petition under The Trustee Act, R.S.M. 1902, c. 170. By numerous authorities it has been held, both in Ontario and England, under Acts similar to our own, that this legislation does not give the Court power to determine the rights of the parties or any party under a will upon petition, or to give its opinion for the guidance of trustees. The object of the Act was to assist as to little matters of discretion, etc.

See cases collected in 17 C.L.T. 287.

Under Rule 994 it seems settled, under the interpretation of a similar rule both in England and Ontario, that the construction of a will may be determined: *Re Sherlock*, 18 P.R. 6; *Re Whitty*, 30 O.R. 300; *Re Lacasse*, 9 D.L.R. 831; *Re Rally*, 25 O.L.R. 112; *Kerr v. Baroness Clinton*, L.R. 8 Eq. 462.

Charles Dion departed this life having first made his last will.

The question for the determination and advice of the Court arises under clauses 3 and 5 of his will.

Clause 3 reads as follows:

"I do hereby give and bequeath unto my niece Mrs. Ovila Dabelle (born Emma Bellemore) the following property: Lots twenty-five and twenty-six which lots are shown on a plan of Survey of St. Jean Baptiste in Manitoba, registered in the Winnipeg Land Titles Office as No. 714, and all personal estate in the buildings thereon."

Clause 5 reads as follows:

"I also give and bequeath on to my dear Brother Philias Dion all the real and personal property or estate to which I shall be entitled at the time of my decease, namely, \* \* \* ; also a certain sum of ready money deposited in La Bank of Ottawa at Winnipeg, Manitoba."

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Judgment.

MACDONALD,  
J.

The following are the questions upon which the advice of the Court is desired:

(1) Whether under clause 3 of the said will Mrs. Ovile Labelle therein named takes an estate in fee simple, and if not, what estate, in the lands and tenements therein described.

(2) Whether clause 5 of the said will cuts down or reduces the estate devised to the said Mrs. Ovila Labelle by said will.

(3) Whether under the provisions of the said will the estate devised to Mrs. Ovila Labelle is restricted or not.

(4) Whether clauses 3 and 5 of the said will are contradictory or repugnant and, if so, what is the effect of clause 5 construed with reference to the rest of the said will, and particularly clause 3 thereof.

(5) Whether Mrs. Ovila Labelle and Philias Dion take concurrently in said lands described in clause 3 of the said will.

(6) Whether gift under clause 3 is annulled by gift under clause 5.

(7) Whether gift under clause 3 is qualified by subsequent gift.

(8) Whether gift under clause 3, being a distinct gift, is controlled by gift under clause 5, being in general terms.

(9) Whether particular devise under clause 3 is controlled by general devise under clause 5.

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Judgment. (10) Whether gift in clause 5, described in a general  
MACDONALD, way by residue, included property effectively disposed of  
J. by prior clauses.

(11). Whether, the testator having shown an intention in clause 3 with regard to the property therein described inconsistent with its ever falling into the residue, effect must not be given to that intention.

And also for an order generally declaring the rights of Mrs. Ovila Labelle and Philias Dion under said will and the estate that Mrs. Labelle and Philias Dion obtained under said will.

The rule is that the later part of a will shall prevail against inconsistent expressions in the prior part of it; but it is also a settled and invariable rule not to disturb the prior devise farther than is absolutely necessary for the purpose of giving effect to the posterior qualifying disposition: *Jarman on Wills*, 569.

A gift of property in a will described in a general manner by way of residue will include all property within the general description which is not otherwise effectually disposed of by the will: *Underhill and Strahan*, Art. 27, p. 151.

If there is an express contradiction between two clauses in a will, it is settled by law that the second part of the will must take effect over the first part, but is there in the will under consideration any contradiction or repugnancy in clauses 3 and 5? I am of the opinion that there is not any contradiction or repugnancy.

The testator specifically devises certain lands under paragraph 3 and the subsequent residuary devise can only be interpreted to mean his estate not effectively disposed of by the will.

If we were driven to construe the intention of the testator, it is made plainly manifest by paragraph 4 of his will, whereby he specifically devises to his brother Philias



Dion the land therein described, showing to my mind clearly his intention, by the residuary clause by which he gives to this brother all the estate to which he would be entitled at the time of his death, to be that the residue applies only to such as has not been specifically disposed of.

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Judgment.  
MACDONALD,  
J.

I therefore make the declaration that Mrs. Ovila Labelle takes the property described in clause 3 of the testator's will absolutely and that the same is not in any manner affected by clause 5 of the said will.

Costs out of the estate.

### COURT OF APPEAL.

#### WALLACE V. LINDSAY.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, JJ.A.

*County Courts—Jurisdiction of Judge—County Courts Act, R.S.M. 1902, c. 38, s. 330—Reversal of judgment—Ex parte application—Objections not raised at trial—Costs.*

The defendants in this action had sued Wallace, the plaintiff in this action, and K. Smith and E. Smith, in the County Court.

The record of the County Court proceedings contained the following entries :—

" July 26, 1911. Trial and judgment for plaintiff against defendant K. Smith for \$491.25 debt, together with \$ . . . . costs. Action dismissed as to other defendants.

" Aug. 5, 1911. Affidavit of intention to appeal.

" Aug. 19, 1911. Paid as security for costs, \$25.00.

" Aug. 22, 1911. Trial and judgment for plaintiffs for \$496.35 debt, together with \$47.45 costs.

" Aug. 24, 1911. Certificate of judgment."

On the strength of the entry of August 22, 1911, the defendants took out and registered a certificate showing a judgment in their favor for \$496.35 and costs against Wallace and the two Smiths. Wallace then brought this action claiming that the said certificate of judgment should be declared void and its registration vacated.

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There was no evidence at the trial except what was of a formal character, and the facts of what took place before the County Court Judge after 26th July, 1911, were not put in evidence. It was, however, set up by Lindsay that, on an *ex parte* application made by him to the Judge of which no notice had been given to Wallace or his solicitor, the Judge had caused the judgment of August 22nd, 1911, to be entered.

*Held*, reversing the decision of Metcalfe, J., that, under the circumstances, the Court must assume that the County Court Judge would not, after entering a judgment in favor of two of the parties, in their absence and without notice to them, set aside that judgment and enter a judgment against them and that, in that view, the entry of August 22, 1911, did not necessarily mean more than the rectification of a clerical error in the entry of judgment by slightly increasing the amount against K. Smith, especially as the entry was silent as to the person or persons against whom the judgment was given, and was, therefore, insufficient to warrant the issuing of the certificate of judgment against Wallace, which should be declared void and its registration vacated, with costs of the action.

No costs of the appeal were allowed, because the plaintiff did not, at the trial, raise the point upon which his appeal succeeded.

DECIDED: 23rd June, 1913.

**Statement.** THE plaintiff was the owner of the lands in the statement of claim described. He claimed that the defendant entered an action in the County Court of Winnipeg against the plaintiff and others; that judgment was rendered dismissing the action against the plaintiff; yet, notwithstanding, the defendants pretended that judgment was subsequently recovered against the plaintiff; that the defendants had registered a certificate of such judgment, and that the plaintiff was thereby hindered from dealing with the lands.

He claimed:

(a) That the County Court judgment be declared void.

(b) That the registration be vacated.

(c) A declaration that the certificate did not bind the lands.

The following judgment at the hearing was delivered by

METCALFE, J. At the trial the plaintiff put in an exemplification of the judgment in this case. The following entries in such exemplification are material:

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Judgment.  
METCALFE,  
J.

"July 26, 1911, Trial and judgment for plaintiff against defendant K. Smith for \$491.25, debt, together with \$..... costs. Action dismissed as to other defendants."

"Aug. 5, 1911, Affidavit of intention to appeal."

"Aug. 19, 1911, Paid in as security for costs \$25.00."

"Aug. 22, 1911, Trial and judgment for plaintiffs for \$496.35, debt, together with \$47.45 costs."

"Aug. 24, 1911, Certificate of judgment."

No explanation was given by the plaintiff as to the reason why there was a second trial.

Were it not for an amendment to the statement of defence, I would have had no hesitation in dismissing the plaintiff's action. There are various ways in which a new trial might properly be had, and I would assume that the learned Judge of the County Court proceeded regularly.

The defendant, however, has set up as an alternative defence that subsequent to the first trial the defendants made an *ex parte* application to the County Court Judge, who caused the second judgment to be entered. It, therefore, appears that, after the action had been dismissed against the plaintiff, there was a subsequent disposition of the cause without notice to this plaintiff, whereby a judgment was rendered and entered against him. I do not think that practice should be followed: certainly it should not be generally allowed. But, if the learned County Court Judge had jurisdiction to entertain such an application *ex parte*, then the judgment is not a nullity and I can make no declaratory order.

Section 330 of the County Courts Act, R.S.M. 1902, c. 38, provides as follows:

"A new trial or a re-hearing may be granted or a judgment reversed or varied in any action, or suit, or in any matter or proceeding, upon sufficient cause being shown for that purpose."

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Judgment.  
METCALFE,  
J.

While it seems to me contrary to all principle that these proceedings should have been taken *ex parte*, I think that this section gives jurisdiction to the learned Judge of the County Court.

The action will be dismissed with costs.

Plaintiff appealed.

A. C. Campbell for plaintiff.

J. E. Adamson for defendant.

The judgment of the Court was delivered by

PERDUE, J.A. This is an action brought to set aside the registration of a certificate of judgment issued by the County Court of Winnipeg, and registered in the Winnipeg Land Titles Office. The certificate declares that judgment was recovered against the defendants, of whom the present plaintiff is one, on the 22nd August, 1911, for the sum of \$496.35. The plaintiff alleges that no such judgment was entered against him in the County Court action, but, on the contrary, that judgment had been entered in his favor.

At the trial the plaintiff put in an exemplification of the record in the County Court suit in question. This shows that the action in the County Court was between W. J. Lindsay, H. W. Harvey and E. J. Short, trading under the name of William J. Lindsay & Co., as plaintiffs, and Kathleen Smith, Edmund Smith and Robert Wallace, trading as K. Smith & Company, as defendants. The plaintiffs in the County Court suit are the defendants in the present suit, and Robert Wallace, one of the defendants in the County Court suit, is the present plaintiff.

One of the entries contained in the record of the County Court proceedings was as follows:

"Trial and judgment for plaintiffs against defendant K. Smith, \$491.35 debt, together with \$ . . . costs. Action dismissed as to other defendants."

The date of this entry is given as July 26, 1911. Fol-

lowing the above entry we find it noted that, on August 5th following, an affidavit of intention to appeal was filed, and that, on August 19th, \$25 was paid in as security on the appeal. This would, of course, refer to an appeal to the Court of Appeal. Then, under date of August 22, 1911, appears the following entry:

"Trial and judgment for plaintiffs for \$496.35 debt, together with \$47.45 costs."

By an amendment to the statement of defence made shortly before the trial, the defendants allege that, if a judgment was given on 26th July, 1911, which they deny, they made an *ex parte* application to the County Court Judge, and the judgment originally given by the Judge was varied, altered or amended so as to be a judgment for \$496.35 against the present plaintiff Robert Wallace and the other defendants in the County Court suit.

At the trial no evidence was given except what was of a formal character, and the facts of what took place before the County Court Judge after the 26th July, 1911, were not put in evidence. It was, however, admitted that an *ex parte* application had been made to him and that neither the plaintiff nor his solicitor was given notice of such application. Further, it was admitted that the affidavit of intention to appeal had been filed and the security of \$25 paid in by the plaintiffs in the County Court suit with the intention of appealing against the judgment of July 26th.

In the absence of evidence as to what actually took place before the County Court Judge after the 26th July, 1911, the Court must assume that the County Court Judge would not, after entering a judgment in favor of two of the parties, in their absence and without notice to them, set aside that judgment and enter a judgment against them. In the absence of evidence fully explaining the whole matter, the Court will be astute to seize upon any explanation that can be inferred from the en-

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Judgment.  
PERDUE,  
J.A.

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Judgment.  
PERDUE,  
J.A.

tries in the record to show that the Judge did not intend to act as the defendants in the present suit claim to have acted.

It is to be noted from the record of the proceedings that the defendants had filed the usual affidavit to appeal and furnished the security on such appeal. That statement that the defendants admitted the entry of judgment in this action on July 26. It is further to be observed that the entry of August 22 is simply a statement that there had been a trial and judgment for the plaintiffs for \$490. It does not say as against what defendants this judgment was entered. One may, therefore, reasonably infer that the entry of August 22 was simply a correction of the entry of July 26 by increasing the amount of the judgment entered on July 26 by \$5, apparently to rectify a clerical error in the amount, and that the judgment stood as one for the plaintiffs against the defendant K. Smith alone.

Accepting this explanation, the certificate of judgment issued by the County Court and registered against the plaintiff's lands does not conform to the judgment entered in the County Court. The certificate should, therefore, be declared void and the registration of it vacated.

The plaintiff in this action did not at the trial raise the point upon which this appeal has turned. The point was in fact for the first time raised during the argument on the appeal. For that reason we do not think the plaintiff should be entitled to the costs of the appeal.

The appeal will be allowed without costs. The judgment in the Court of King's Bench will be set aside and judgment entered for the plaintiff, declaring the certificate of judgment in question to be void and vacating the registration of it, with costs.

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## MCCUTCHEON V. JOHNSON.

Before PRENDERGAST, J.

*Pleading—Amendment—Detinue—Conversion.*

The plaintiff's claim was for damages for the alleged wrongful detention of five horses. He did not allege conversion of the horses. The evidence at the trial, however, in the opinion of the trial Judge, showed a conversion of the horses by the defendants to their own use absolutely, that the defendants were not taken by surprise and that the amount for which the defendants could be found liable in detinue would exceed their liability for conversion.

*Held*, that the plaintiff should have leave to make all proper amendments to the statement of claim and should have judgment for the value of the five horses as in an action for conversion of them to his own use.

DECIDED: 7th July, 1913.

THE plaintiff, by statement of claim delivered September 3rd, 1909, sued for the hire of five teams of horses from February 1st to April 30th, and from May 1st to November 15th all in 1909; and, in the alternative, for wrongfully detaining the said horses since January in the same year. Statement.

*W. L. McLaws* and *A. E. Bowles* for plaintiff.

*R. A. Bonnar, K.C.*, and *W. H. Trueman* for defendants.

PRENDERGAST, J. It is admitted that the defendants in the spring of 1909 hired from the plaintiff about 34 horses, which were taken to the former's construction camp situate a few miles from Vermilion Bay in the Province of Ontario.

The main point in dispute is that, while the plaintiff claims that the defendants were to send him back his horses at their own cost when they were through with their work, the latter contend that they had only to notify the plaintiff to come and take delivery of his horses at Vermilion Bay, and that they did send him notice to so take delivery on November 15th, 1908, thereby terminating the hiring as of that day.

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Judgment.PRENDERGAST,  
J.

On the 8th and 20th days of January, 1909, the plaintiff sent his man to Vermilion Bay to bring back his horses, but he received only 26 in all—being informed by the defendants that two or three had died and that they were keeping back the remainder as security for having fed the whole band since November 15th, on which date, as they contended, the hiring had come to an end.

By statement of claim delivered March 11th, 1909, the plaintiff instituted a first action which was eventually tried before my brother Macdonald, claiming for hire of 35 horses from the spring of 1908 to January 8th, 1909, and of ten teams from the last mentioned date to January 20th, 1909; as also for the loss of 3 horses—the total claim amounting to \$5,470.30. A general judgment for \$773 was given in favor of the plaintiff on the whole cause of action, without particular reference to the different counts, which judgment was duly entered.

With reference to the hiring in the present action, I must find that there was none during the period claimed; that is to say, that all hiring was terminated on November 15th, 1908, which was disposed of in the previous action.

It is to be noticed that, in the first action, the statement of claim was delivered on March 11th, 1909, and the claim for hire was only up to January 20th, 1909. Why did the plaintiff not claim then for the balance of January, as well as for February and part of March, if he was entitled to it? This is, however, only a matter of inference and may perhaps be partly, if not altogether, explained. But I take it to be established that the defendants did send to the plaintiff their letter of October 20th, 1908, giving him notice that they were through with the season's work and to come for the horses. The plaintiff's denial on this point would surely cause me to hesitate, were it not that there is other documentary



evidence showing that his memory must be at fault on this matter.

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Judgment.

PRENDERGAST,  
J.

It is shown that, in the beginning of December, the defendant Johnson met the plaintiff and told him about having sent him a letter asking him to come for the horses, to which the latter replied that he had not received the same. A day or two later, which was December 11th, Johnson made it a point to again write to the plaintiff, also enclosing a copy of his previous letter of October 20th. The plaintiff could not remember, and in fact denied in his examination for discovery, having ever received this letter of December 11th. But there is his own (the plaintiff's) letter of December 15th acknowledging the receipt of that of the defendants of December 11th, and from which I must come to the conclusion that he had also received that of October 20th by which an end was put to the hiring on November 15th.

This would then dispose of the hiring, leaving the count for detaining to be inquired into.

I first find from the statement of claim in the first action, as well as from Holmes' evidence and the defendants' receipts to the chief contractor, that there were 34 horses sent out and received by the defendants. It is admitted that the plaintiff got back 26. This leaves 8 to be accounted for.

In the plaintiff's previous action there was a claim for three horses lost, and I must take it that that claim is covered by the judgment then obtained, which further reduces the number of horses left in the defendants' possession to five.

As to the two or three horses which James, Holmes and a third witness say died from natural causes, I must assume that they are the same that were first sued for. On the whole, I believe, as it appears from the evidence of James, who was the stable boss at Vermilion Bay,

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Judgment.

PRENDERGAST,  
J.

that the defendants are liable, if at all, with respect to five horses.

I gather from the evidence that the defendants have been working those horses continuously, and have taken some of them at least as far as the Province of Alberta, where they were put on the heaviest railroad work. The fact is that they have made them their own and converted them to their use not only technically, but in the strictest, usual acceptance of the term.

Counsel for the defendants objected that the action is, in its form, one for detinue and not conversion. I would say to this, that the evidence fully supports conversion as well as detinue, that it is manifest that the defendants were not taken by surprise, that there seems to be sufficient allegation of all that is required to constitute conversion, and that the amount for which the defendants could be found liable in detinue would exceed their liability for conversion. If thought necessary, I will include in my judgment a direction for all proper amendments to the statement of claim.

As to the objection that the plaintiff cannot split his claim, based on the fact that he sued for the loss of three horses in his previous action, it does not seem to me to be well taken, as it is open to the plaintiff to say not only that he is asserting different rights, but that the horses referred to in the two actions are not the same.

I value one of the horses at \$175, one at \$150, two at \$125, and one at \$100. There will be judgment for the plaintiff for \$675 and costs.

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## MASSEY V. WALKER.

Before MACDONALD, J.

*Vendor and purchaser—Cancellation of agreement of sale—Construction of contract—Equitable relief—Waiver—Recovering back money paid.*

A notice of cancellation of an agreement of sale of land after default should be construed strictly; and, in order to effectually cut out all interest of the purchaser, it must closely comply with the power of cancellation contained in the agreement: *Le Neveu v. McQuarrie*, (1907) 21 M.R. 399; *Mills v. Marriott*, (1912) 3 W.W.R. 841; *Canadian Fairbanks v. Johnston*, (1909) 18 M.R. 589.

The Court will relieve a purchaser against a mere provision for forfeiture on default if there has been no unreasonable delay, and if there is nothing in the *express stipulations* between the parties, the nature of the property, or the surrounding circumstances which would make it inequitable to interfere with or modify the legal right of the vendor: *B.C. Orchard v. Kilmer*, (1913) 3 W.W.R. 1119, (Privy Council judgment), and *Roberts v. Berry*, (1853) 3 De G.M. & G. 284.

The agreement of sale in this case provided that, on default in payment, "the vendor shall be at liberty to determine and put an end to this agreement, and to retain any sum or sums paid thereunder as and by way of liquidated damages; . . . by mailing in a registered package a notice signed by or on behalf of the vendor intimating an intention to determine this agreement, addressed, etc., and if, at the end of thirty days from the time of mailing thereof, the amount so due be not paid," then the purchaser shall deliver possession of the property at the expiration of the thirty days, "and, if the said notice be one of intention to determine this agreement, this agreement shall, at the expiration of the said thirty days, become void and be at an end, and all rights and interests hereby created or then existing in favor of the purchasers or derived under this agreement shall thereupon cease and determine, and the lands hereby agreed to be sold shall revert to and revest in the vendor . . . without any suit or legal proceedings to be brought or taken and without any right on the part of the purchasers for any compensation for moneys paid under this agreement." After default, the vendor gave a notice to the purchasers which the trial Judge found to be in strict conformity with this power, but the purchasers made no move towards making good their default and did nothing to assert their right to redeem until nearly six months afterwards.

*Held*, that the vendors' notice was, under the circumstances, effectual to cancel the agreement and that he was entitled to a declaration that it had been cancelled and is null and void, and that the lands have reverted and revested in him free from the claim of the purchasers and to an order vacating and discharging the caveat they had registered against the land under the agreement, with costs of the action to the vendor.

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*Canadian Fairbanks v. Johnston*, (1909) 18 M.R. 589, distinguished.  
Held, also, that the vendor had not waived the forfeiture by receiving and retaining, before the expiration of the thirty days, further payments on account of the purchase money.

*Keene v. Biscoe*, (1878) 8 Ch. D. 201, followed.

The vendor in this case having offered to pay back the moneys received on account, the amount was ordered to be set off against his costs and any excess to be paid to the purchasers.

DECIDED: 3rd May, 1913.

Statement. ACTION for relief under an agreement of sale, after notice of cancellation had been given.

*A. G. Kemp and W. P. Fillmore* for plaintiffs.

*H. F. Tench and R. L. Henry* for defendant.

MACDONALD, J. On the 18th December, 1911, the plaintiffs purchased from the defendant under an agreement of sale (Ex. 3) the lands and premises there described for the sum of \$2,700, and made a payment of \$100, being the first cash payment referred to in the said agreement, and entered into possession of the lands.

The plaintiffs made default in payment of the principal and interest falling due under said agreement and by reason of the non-observance of the covenants, provisions, stipulations and agreements of the said agreement the whole of the moneys secured by the said agreement became due and payable.

The agreement contains the following proviso:

"Provided that in default of payment of the said moneys and interest, or any part or parts thereof on the days and times aforesaid, or of performance or fulfilment of any of the stipulations, covenants, provisions and agreements on the part of the purchasers herein contained, the vendor shall be at liberty to determine and put an end to this agreement and to retain any sum or sums payable thereunder as and by way of liquidated damages in the following method, that is to say—by mailing in a registered package a notice signed by or on behalf of the vendor intimating an intention to determine this agreement, addressed to the purchasers at Winnipeg Post Office, or by delivering the said notice to the purchasers

personally, and if, at the end of thirty days from the time of mailing or delivery thereof, the amount so due be not paid, then the said purchasers shall deliver up quiet and peaceable possession of the said lands and premises or any part thereof, to the vendor or agent immediately at the expiration of the said thirty days; and, if the said notice be one of intention to determine this agreement, this agreement shall, at the expiration of the said thirty days, become void and be at an end, and all rights and interests hereby created or then existing in favor of the purchasers or derived under this agreement shall thereupon cease and determine and the lands hereby agreed to be sold shall revert to and revest in the vendor without any further declaration of forfeiture or notice or act of re-entry and without any other act by the vendor to be performed, and without any suit or legal proceedings to be brought or taken and without any right on the part of the purchasers for any compensation for moneys paid under this agreement."

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MACDONALD,  
J.

The defendant did, on 17th September, 1912, cause notice of cancellation to be given and served by registered post upon the plaintiff Norman Massey and on the plaintiff Stuart on 19th September, 1912.

Following the expiration of thirty days from date of service of the notice of cancellation, the defendant notified the plaintiffs' tenant occupying the premises that he (the defendant) had become the absolute owner of the said premises and that the plaintiffs had no estate or interest therein and thenceforward the rents were paid to the defendant.

The notices of cancellation were mailed as provided for in the agreement of sale on the dates stated, but were not received by the plaintiff Stuart until October, 1912, and by the plaintiff Massey until November, 1912. In the meantime payments had been made by the plaintiffs and accepted by the defendant on account of the purchase.

In December, 1912, the plaintiff Stuart had a conversation with the defendant, when he told him that he had

1913      a prospective purchaser for the property, and stated  
Judgment.      price and terms. The defendant replied that he also  
MACDONALD,      a purchaser who would make a larger deposit, and w  
J.      the sale was completed the plaintiffs would get t  
money back.

The plaintiff Massey was not a party to this un  
standing and in December, 1912, he called upon  
defendant, when the latter stated that he had been  
to expense in connection with the sale to the plain  
and that there would be nothing coming to them,  
this stand he has taken throughout.

I find that the only expense he was put to was  
sum of \$27.45, costs of a loan which he had raised u  
the property for his own benefit, and which he says  
to be paid by the plaintiffs, and he received from  
plaintiffs the sum of \$301.

He now, however, claims a forfeiture of this mone  
well as a cancellation of the agreement of sale and a  
vesting in him of the property.

Now let us see if the notice of cancellation is in  
cordance with the provisions of the agreement  
sufficiently effective to cut out all further interests of  
plaintiffs in the said lands.

Notices of cancellation are construed strictly and  
jected to the closest compliance with the power enab  
them: *LeNeveu v. McQuarrie*, 21 M.R. 399; *Mill*  
*Marriott*, (S.C.R.) 3 W.W.R. 841.

The agreement provides that on default being m  
the vendor may determine the agreement and retain  
moneys in the following method: that is to say,

"by mailing in a registered package a notice signed  
or on behalf of the vendor intimating an intention  
determine this agreement, addressed to the purchas  
at Winnipeg Post Office, or by delivering the said no  
to the purchasers personally; and, if, at the end of th  
days from the time of mailing or delivery, the amount

be not paid," then the agreement shall at the end of 1913  
thirty days become void and be at an end and the Judgment.  
moneys paid forfeited. MACDONALD,  
J.

The sufficiency of the notice of cancellation is the subject of much debate *pro* and *con*. It is contended by counsel for plaintiff that it does not conform to the terms of the agreement.

(a) That it does not express an immediate intention to cancel.

The agreement provides that, if at the end of thirty days from the time of mailing \* \* \* the amount due be not paid, then the purchasers shall give up quiet and peaceable possession at the expiration of the said thirty days and, if the said notice be one of intention to determine the agreement, the agreement shall at the end of the said thirty days become void and at an end and all rights and interests thereby created or then existing in favor of the purchasers or derived under the agreement shall thereupon cease and determine and the funds shall revert to and revest in the vendor without any further declaration of forfeiture or notice or act of re-entry and without any other act by the vendor to be performed and without any right on the part of the purchasers for any compensation for moneys paid under the agreement.

This agreement, so far as cancellation rights are concerned, is similar to that in *Canadian Fairbanks v. Johnston*, 18 M.R. 589.

In that case the notice which was intended as a cancellation stated "that, as you have made default, etc., the said agreement is hereby determined and put an end to," etc. The notice did not follow the wording of the proviso, which says the vendor shall be at liberty to determine this agreement by mailing a notice intimating an intention to determine this agreement, and if the

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Judgment. MACDONALD,  
J.  
notice be one of intention to determine the agreement the agreement shall become void. The notice was held bad in not intimating an intention to determine as provided for in the agreement.

In the case under consideration the notice seems to me well within the provisions of the agreement. It reads: "it is the intention of the vendor to determine the said agreement and to exercise the power of cancellation and re-entry provided in the said agreement," etc., and the agreement declares that immediately after the expiration of the said thirty days, and if the said notice be one of intention to determine this agreement, this agreement shall at the expiration of the said thirty days become void and at an end.

(b) Objection is taken that the notice of cancellation was not addressed to the purchasers, and further that one of the purchasers was served two days later than the other. I see no force in these objections. The notice was addressed to the purchasers by name; and, although one was served two days later than the other, that would not affect the right of the first served to redeem up to the expiration of the thirty days from the date of service upon the last served.

Several other objections are taken which to my mind are trivial and do not call for discussion.

The notice of cancellation then I find was effective and in compliance with the requirements of the agreement and, the default not having been remedied, the agreement is in law at an end, as at law the rule always was that the time fixed for completion was of the essence of the contract. The rule in equity, however, is different and, although unreasonable delay would of itself conclude either party, the Court would relieve against or enforce specific performance notwithstanding default in any step towards completion if it could do justice between the parties and if there is nothing in the *express stipu-*



lations between the parties, the nature of the property or the surrounding circumstances which would make it inequitable to interfere with or modify the legal right. This is what is meant and all that is meant when it is said that in equity time is not of the essence of the contract: *Roberts v. Berry*, 3 De G.M. & G. 284.

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Judgment.  
MACDONALD,  
J.

If there was no express stipulation between the parties, other than a provision as to a forfeiture on a mere default by the purchaser, it is plain the Court would relieve, holding such a forfeiture to be in the nature of a penalty: *B.C. Orchard v. Kilmer*, 3 W.W.R. 1189 (Privy Council judgment), but here is an express stipulation between the parties providing and agreeing to a means by which the agreement may be put an end to. It is not an automatic conclusion resulting from default, but the result of a deliberate agreement by which the mode of cancellation is arrived at. The notice of cancellation served upon the purchasers repeats the provisions of the agreement under which it may be cancelled and ends by an effective cancellation. The purchasers had thirty days within which to make good their default. Notices of cancellation were served by mailing on the 17th and 19th September, 1912, although not received until after the thirty days had expired. Had the plaintiffs, after the receipt of such notices, made some move towards making good their default and satisfactorily explained the reason of their delay, there might be some equity in their favor, but they did nothing until March, 1913, to assert their right to redeem, and their only explanation is that they thought the property lost to them by reason of the notice.

It is also urged by counsel for the plaintiffs that, owing to the receipt by the defendant from the plaintiffs of moneys on account of the purchase after the service of the notice, but before the expiration of the thirty days, that he had condoned the default. These moneys

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J.

were remitted by the plaintiffs before the notices of cancellation had been served, but received by the defendant after. It could not therefore have been intended by them as a condonation of their default and I do not think it would have that effect on the vendor. They had the thirty days within which to make their payment. The vendor might very well accept any portion during the running of the thirty days in expectation of the balance being paid before the expiration of that time. See *Keene v. Biscoe*, 8 Ch.D. 201.

In my opinion the plaintiffs have not made out a case for relief; but, as the defendant has offered to reimburse them the moneys received on the purchase price less any expense he has been put to by reason of the default, there will be a reference to the Master to ascertain the amount and the same shall be applied on the defendant's costs and, if any amount in excess of such costs, the same to be paid to the plaintiffs.

The defendant is entitled to a declaration that the agreement has been cancelled and is null and void and that the lands have reverted and revested in him free from the claim of the plaintiffs and the caveat 66869 be vacated and set aside and discharged.

Costs to the defendant.

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## COURT OF APPEAL.

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## THOMPSON V. YOCKNEY.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, JJ.A.

*Real Property Act, ss. 100, 130—"Interest" in land—Agreement to give mortgage—Caveat—Practice—Counterclaim—Defence to counterclaim—Whether plaintiff bound to file defence to counterclaim—King's Bench Act, s. 2 (e), Rules 291-301.*

*Held, per MATHERS, C.J.K.B., in the Court below:*

1. Notwithstanding that section 100 of the Real Property Act, R.S.M. 1902, c. 148, says that "A mortgage or an incumbrance under the new system . . . shall not operate as a transfer of land thereby charged or of any estate or interest therein," a person to whom the owner of the land has agreed to give a mortgage upon it has an "interest" in the land within the meaning of section 130 and may protect his right by filing a caveat, and a counterclaim filed by the caveatee in defending an action for specific performance, asking for the removal of the caveat, should be dismissed.

*Reid v. Minister of Public Works*, (1902) 2 S.R. (N.S.W.) at p. 416, *Tolley v. Byrne*, (1902) 28 Vict. L.R. at p. 101, and *Neal v. Adams*, (1885) 4 N.Z.R. S.C. 177, followed.

2. Prior to the amendments made by 3 Geo. V., c. 12, s. 3, to Rule<sup>6</sup> 296, 297, 298 and 298B of the King's Bench Act, a plaintiff, against whom the defendant filed a counterclaim, was not bound to file any defence to it, and the defendant could not sign interlocutory judgment against the plaintiff on his counterclaim for default of a defence to it. The plaintiff in such a case could have filed a defence to the counterclaim; but, if he did not, he was considered to have denied all material allegations in it.

The word "defence" in Rules 294, 295 and 301 includes a counterclaim where there is one.

Rules 291-301 and paragraph (e) of section 2 of the Act specially considered and explained.

On appeal the Court dismissed same without calling on respondent's counsel.

DECIDED: 30th September, 1913.

THE plaintiff sued for specific performance of an agreement made with the defendant Henry Yockney for the sale to him of part of Lot 39 St. Clements, the deferred portion of the purchase money to be secured by a mortgage on the property sold and also on a portion of Lot 38 St. Clements, owned by the purchaser. The plaintiff filed a caveat upon his agreement as against

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Statement. Lot 38 on the 3rd of September, 1911. On the 9th of September the defendant Henry Yockney gave a mortgage upon Lot 38 to his co-defendant Charles E. Yockney for the expressed consideration of \$10,000.

Paragraph-6 of the statement of claim alleged that, the defendant Henry Yockney "having made no move to carry out his part of the said agreement, the plaintiff, claiming an estate or interest in the said land described in paragraph 3 and to be entitled to a mortgage thereon as provided by the aforesaid agreement, duly filed with the proper District Registrar in that behalf a caveat in the proper form under the Real Property Act forbidding the registration of any instrument affecting the said land unless such instrument be subject to the said claim of the caveator, and the said caveat was filed on the 3rd of September, 1912."

Paragraph 8 sets out that "the defendant Henry Yockney executed a mortgage on the said lands described in paragraph 3 hereof to his co-defendant Charles E. Yockney, for the express consideration of \$10,000, which mortgage was declared to be subject to the aforesaid caveat and was registered by the defendant Charles E. Yockney."

The defendant Charles E. Yockney, by his defence, admitted paragraph 8, but he denied that the plaintiff had any interest in Lot 38 entitling him to file a caveat, and he counterclaimed to have the caveat removed.

The following judgment at the hearing was delivered by

MATHERS, C.J.K.B. The important question raised in this matter is, whether or not a person to whom the owner of land under the Real Property Act has agreed to give a mortgage may protect his right by filing a caveat.

Section 100 of the Act provides that "A mortgage or an incumbrance under the New System shall have effect as a security but shall not operate as a transfer of land thereby charged or of any estate or interest therein."

By section 130, "Any person claiming an estate or interest in land" under the New System may file a caveat.

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It may, I think, be taken as settled that a person who has neither an "estate" nor an "interest" in land has no right to lodge a caveat forbidding the registration of any instrument affecting it. The question is, has a mortgagee, or what amounts to the same thing, a person holding an agreement for a mortgage, such an "estate" or "interest"?

A mortgagee upon default may enter into possession by receiving the rents and profits, and may distrain upon the occupier or tenant, or may bring an action to recover the land in the same manner as if the mortgage moneys had been secured to him by an assurance of the legal estate and he may foreclose the right of the mortgagor to redeem the land (sec. 106). He may distrain on the goods of a tenant in the same way as a landlord might do (sec. 107). He may, upon default, enter into possession and lease the lands (sec. 109); or sell under power of sale (sec. 110); and execute a transfer thereof (sec. 111); which upon registration shall be effectual to vest the estate or interest of the mortgagor and owner in the purchaser (sec. 112); or he may foreclose, and in that way become absolute owner (sec. 113, 114). It seems a contradiction in terms to say that a person possessing a charge upon land accompanied by these large rights for enforcing it, and who may eventually either sell or become by foreclosure absolute owner of the land, has not an interest in it.

Under the Australian systems a mortgagee is held to have an interest, but not an estate. A "mortgage is a charge and nothing more \* \* . It confers an interest but no estate," per Owen, J., in *Reid v. Minister of Public Works*, 2 S.R. (N.S.W.) at 416. Even a mortgagee by deposit of the certificate of title gives the mortgagee

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an interest in the land: *Tolly v. Byrne*, 28 V.L.R. 95.

In that case O'Beckett, J., said, at p. 101:

"I cannot conceive any sound ground for saying that it is not an interest in the land. It amounts to a contract between the parties that security shall be given over that land for the debt for which it is deposited."

According to the principles of the Torrens System, any right conferred by contract relating to land against the registered proprietor is a sufficient "interest" to support a caveat: *Hogg*, 1037. The effect of a mortgage under the statute is to confer upon the mortgagee a very important interest in the land, and one which under other systems may be protected by caveat: *Neal v. Adams*, 4 N.Z.R.S.C. 177.

But for section 100 it would not be arguable that a mortgagee has not an "interest" sufficient to entitle him to lodge a caveat. Upon both principle and authority a mortgage under the Act does confer an interest in the land mortgaged to the mortgagee. If the word "interest" in section 100 is to be given the meaning which defendant's counsel contends for, then by that section a mortgage is deprived of the effect conferred upon it by the other parts of the Act. I can see no object that the Legislature could have in creating such an anomaly.

The expression "interest," as used in the Torrens Acts, does not always mean the same thing: *Hogg*, 785. It sometimes means the same thing as estate. In *Wharton's Law Lexicon* it is said that "estate" is used as meaning the quantity of interest in realty owned by a person; and in *Murray's New English Dictionary* "estate" is defined as "the interest which any one has in his lands and tenements." In my opinion it is used in section 100 as synonymous with "estate." I do not think it means the same thing as when used in section 130. In that section the term "interest" is used in a much wider sense: *Hogg*, 1035.

The conclusion I have arrived at is that the plaintiff's caveat was properly registered and that he is entitled to specific performance of the agreement set out in the statement of claim, a declaration that the agreement forms an equitable mortgage on said Lot 38, and to an order for sale thereof in default of payment. There will be the usual reference to fix the amount due and to fix a time for payment of the instalments now overdue. The plaintiff is entitled to the costs of suit as against both defendants.

The defendant Charles E. Yockney's counterclaim will be dismissed with costs.

The plaintiff delivered no defence to the counterclaim, and the solicitor for Charles E. Yockney signed interlocutory judgment, and thereafter moved for final judgment upon the counterclaim in Wednesday Court. The motion was made before me, and I referred it to the trial Judge. At the trial the plaintiff moved to set aside the interlocutory judgment as not being authorized by the rules. At my suggestion the defendant's counsel consented that the interlocutory judgment be set aside. He, however, claimed that it had been properly signed and asked for the costs of signing it, and of the motion for judgment, which, of course, he is not entitled to unless his proceedings were warranted by the practice.

Rule 291 provides that a defendant in any action may set up by way of counterclaim against the claim of the plaintiff any right or claim whether the same sound in damages or not. Sub-section (a) says a counterclaim shall have the same effect as a statement of claim in a cross action so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross claim. Rule 292 provides for striking out a counterclaim, and 293 provides for giving judgment where the counter claim is established. These rules refer to a counterclaim where the plaintiff alone is concerned.

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MATHERS, of a counterclaim by the defendant against the plaintiff  
C.J. and some third person. In that case the counterclaiming  
defendant shall add to his defence a new style of cause  
similar to the title in a statement of claim setting forth  
the names of all the persons who, if such counterclaim  
were to be enforced by cross-action, would be de-  
fendants to such cross-action, and shall deliver his  
statement of defence to such of them as are parties to  
the action within the period within which he is required  
to deliver it to the *plaintiff*. Where any such person is  
not a party to the action he must be served with a copy  
of the defence, on which shall be endorsed a notice that  
his defence to the counterclaim must be filed within the  
time allowed, otherwise judgment will be entered against  
him. (Rule 295.) The next two rules 296 and 297 are  
difficult to understand. The former says "Any person  
not a defendant to the action who is served with a coun-  
terclaim as aforesaid must file his statement of defence as  
if he had been served with a statement of claim in an  
action. Such person shall be a party to the action from  
the time when the counterclaim is filed."

Then follows 297 which says: "Any person including  
the plaintiff named as a party to a counterclaim may  
deliver a defence thereto as if it were a statement of  
claim." The first sentence of rule 296 is wide enough  
to include a plaintiff against whom a counterclaim is de-  
livered, but the last sentence indicates that it refers to a  
person who was not prior to the filing of the counterclaim  
a party to the action. The fact appears to be that the  
words, "any person not a defendant," in this rule are a  
mistake for "any person not originally a party." The  
first part of this rule was adopted from the old Ontario  
rule 378: *Holmstead & Langton*, 1st ed. 416, which in  
turn had been adopted from English Order 11, rule 13.  
In the *Annual Practice*, 1913, p. 355, the mistake is  
pointed out. In its present form it is not intelligible and



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is moreover inconsistent with rule 297. The person referred to in 296 upon whom a counterclaim is "served" "must file his statement of defence as if he had been served with a statement of claim in an action," whereas the person referred to in rule 297 "may deliver a defence thereto as if it were a statement of claim." I think it reasonably clear that the words "any person", in rule 296, do not refer to the plaintiff in the original action, but it clearly does refer to a person who is made a party to the action by the counterclaim, and it goes on to provide that such a party must file a statement of defence. But rule 297 says that "any person including the plaintiff" named as a party to a counterclaim may deliver a defence. The words, "any person", in this rule include every person named as a party to the counterclaim, except, of course, the counterclaiming defendant, and include those persons referred to in rule 296. We have thus two rules, one of which provides that a person served with a counterclaim must file a defence and the other that the same person may deliver a defence.

The confusion has been caused by the original draftsman adopting the Ontario rules without paying due regard to the fact that, under the Ontario system, an action was commenced by a writ of summons, to which an appearance was entered, whereas under our system the action is commenced by a statement of claim to which, in lieu of an appearance, a statement of defence is delivered. The Ontario rule 378, from which our rule 296 was taken, provides that a person served with a counterclaim must appear thereto as if he had been served with a writ of summons. Having thus only provided for an appearance being entered, it was necessary to provide for the delivery of a defence to a counterclaim. This was done by rule 379, of which Manitoba rule 297 is a *verbatim* copy. In Ontario this rule was the necessary complement of rule 378 and it included every person against

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whom a counterclaim was filed. Manitoba rule 296 having dealt with the question of a defence to a counterclaim by every person not theretofore a party to the action, it was only necessary to provide for the case of the plaintiff against whom a counterclaim had been filed either alone or jointly with some other person. Rule 297 would have served this purpose had it omitted the words, "Any person including", which serve no purpose other than to create confusion.

The joint effect of these two rules appears to me to be that a person first made a party to the action by the counterclaim must file a defence within the time limited by rule 204 (rule 298), or judgment may be recovered against him under rule 298B. A plaintiff, on the other hand, may deliver a defence (rule 297) and, if he desires to do so, he must deliver it within 8 days, rule 298. Rule 297A gives a plaintiff the right to reply to a statement of defence. By rule 301 there shall be no pleadings in an action except those mentioned in rules 296, 297, 297A and 297B, and a statement of claim and a statement of defence. That is (1) a statement of claim; (2) a statement of defence; (3) a defence by a third party to a counterclaim (rule 296); (4) a defence by a plaintiff to a counterclaim (rule 297); (5) a reply by a plaintiff to a defence (rule 297A); and (6) a pleading subsequent to a reply by leave of the Court or a Judge (rule 297B). After ten days from the delivery of the last pleading the action is at issue. It is difficult to say what this sentence means: It does not mean that they have arrived at a point in their pleadings where there is assertion on the one side and denial on the other side, because the next sentence covers that by providing that "after statement of defence is filed the plaintiff shall be held without further pleading to have denied all material allegations in the statement of defence," etc.

A plaintiff may deliver a reply to a statement of de-

ence (rule 297A), but he need not do so; and, if he does not, he is held to have denied all material allegations in the statement of defence. But what if he does not file a defence to a counterclaim? May interlocutory judgment be signed against him for default, or should he be held to have denied all material allegations in the counterclaim? In England, by reason of Order 19, rule 17, and in Ontario, by old rules 728 and 729, and now expressly by rule 593, of which we have no equivalent, except rule 298B, judgment may be recovered by default of defence by a plaintiff to a counterclaim.

In the case of a person other than an original party to the action against whom a counterclaim is filed, he must be served with a notice to defend or in default judgment will be signed against him. No such notice is required to be given to a plaintiff against whom a like claim is made. In the case of the former the language of the rule is imperative that he must file a defence; in the case of the latter it is permissive. Moreover, a counterclaim is not spoken of as a separate pleading, distinct from a defence; but is referred to as a defence (rules 294, 295). By rule 295 a person not previously a party to the action is to be "summoned to appear by being served with a copy of the *defence*." What is meant here is clearly defence and counterclaim. In rule 294 a defence which sets up a counterclaim is also referred to as a statement of defence."

For these reasons, I think it should be held that "statement of defence," where used in rule 301, is meant to include also counterclaim, and that when a plaintiff has filed no defence to a counterclaim he should be held to have denied all material allegations in it. I do not think the concluding sentence of that rule points to any other interpretation. That sentence appears to me to be entirely superfluous, the point having been fully covered by rule 297.

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A consideration of rule 298B confirms the conclusion I have arrived at. It deals with the case of default in filing a defence by a "defendant to a counterclaim." In all other rules where a plaintiff, against whom a counterclaim is filed, is referred to he is called the plaintiff. See rules 292, 297, 298, 301. If the expression "defendant" was meant to include a plaintiff when made a party to a counterclaim, one would expect to find that the expression "plaintiff" included a counterclaiming defendant. By sub-section (e) of section 2 of the King's Bench Act, a defendant who counterclaims is not a "plaintiff."

In my opinion the interlocutory judgment signed by the defendant upon his counterclaim was not warranted by the rules, and should have been set aside with costs to the plaintiff.

Defendant C. E. Yockney appealed.

*J. B. Coyne* and *H. F. Tench* for defendant C. E. Yockney, appellant.

*C. P. Wilson, K.C.*, and *J. E. Adamson* for plaintiff, respondent.

THE COURT dismissed the appeal without calling upon the respondent's counsel.

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## COURT OF APPEAL.

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## SIEMENS V. DIRKS.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, JJ.A.

*Registration of deeds—Registry Act, R.S.M. 1902, c. 150, ss. 27, 49, 50—  
Deposit of mortgage with registrar—Requirements for registration—  
Indorsement of certificate by registrar.*

The policy of the Legislature in enacting the Registry Act, R.S.M. 1902, c. 150, was to enable persons, *bona fide* holding instruments affecting land under the Old System, to protect themselves by their own diligence; and the provisions of the Act should not be construed so as to deprive a person of a priority obtained by registration because of any neglect or carelessness of the registrar, unless it appears certain that such was the intention of the Legislature.

Considering, therefore, that both sections 27 and 49 of the Act provide that a mortgage or other instrument shall be registered by producing it to, or depositing it with, the registrar, with the necessary affidavit of execution, section 50 should not be construed so as to make the indorsement of the certificate thereon, required to be made by the registrar, a pre-requisite for registration, and, in case the registrar neglects for some days to make such indorsement, another instrument registered prior to the time when such indorsement was actually made, but subsequent to the date when the first instrument was deposited with him for registration, does not acquire priority over the latter.

*Harris v. Rankin*, (1887) 4 M.R. 115, in so far as it decided what, constitutes registration; is still applicable to such a case as the present notwithstanding the additional provisions since made by section 50 of the Act.

DECIDED: 21st October, 1913.

THE question involved in this case was one of priority of registration. Statement.

On 5th April, 1905, the defendant Dirks mortgaged certain lands, the title to which was under the Old System, to Peter Siemens, whose executrix the present plaintiff was.

On the 26th April, 1906, Siemens, the mortgagee, took that mortgage to the proper Registry Office, being that for the Registration Division of Manchester, and delivered it, apparently, to the Registrar or his deputy.

On the 7th May, 1906, the deputy registrar put upon

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Statement. the mortgage the certificate of registration required by section 50 of the Registry Act, stating therein that the mortgage had been "duly entered and registered in the Registry Office in and for the Registration Division of Manchester at 10-04 o'clock a.m., on the 26th day of April, A.D. 1906, as No. 26084."

On the 20th January, 1906, Dirks executed a deed of grant of the same lands to the defendant Long.

On the 1st May, 1906, Long delivered this deed to the Registrar for registration, and on said 1st May there was placed on the deed the certificate of registration required by section 50, stating that the deed had been duly entered and registered in the Registry Office "at 10 o'clock a.m. on the 1st day of May, A.D. 1906, as No. 26063."

This action was brought to foreclose the mortgage. The defendant Long claimed priority of registration for his deed over the mortgage, and set up that he was a purchaser for value and without notice.

No attempt was made to impeach Long's claim that he had bought for value and without notice.

The issue, therefore, narrowed down to one question, whether the mortgage was registered on the 26th April, or was not registered until the 7th May, when the certificate was put on under section 50.

MACDONALD, J., held that the putting on of the certificate by the Registrar, under section 50, was an essential part of the registration, and that, as that did not take place, as to the mortgage, until after the Registrar had indorsed the certificate on the deed, the deed had priority and dismissed the action as against the defendant Long.

Plaintiff appealed.

*E. K. Williams* for plaintiff, appellant, cited *Re Stanger and Mondor*, 15 W.L.R. 346; *Harris v. Rankin*,

4 M.R. 115; *Lawrie v. Rathbun*, 38 U.C.R. 255, and *Magrath v. Todd*, 26 U.C.R. 87.

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Argument.

A. E. Hoskin, K.C., and P. J. Montague for defendant, respondent, cited *Hammersmith v. Brand*, L.R. 4 H.L. 171; *Toronto v. Toronto Ry. Co.*, [1907] A.C. 315; *Harris v. Rankin*, 4 M.R. 115; *Lawrie v. Rathbun*, 38 U.C.R. 255, and *Re Stanger and Mondor*, 20 M.R. 280.

RICHARDS, J. A. The question of what constitutes registration has been discussed in a number of cases at different times, but I see no reason for referring to them in dealing with the present case.

A great object of the Registry Act is to enable persons, *bona fide* holding instruments affecting land under the Old System, to protect themselves by their own diligence; and an interpretation of the Act, which would cause a party, who has done all he can to so protect himself, to nevertheless lose his priority through negligence, or carelessness, on the part of the Registrar, should not, I think, be put upon the Act, unless it appears certain that such was the intention of the Legislature.

Section 27 of the Registry Act, R.S.M. 1902, c. 150, after referring to the manner of registering certain instruments, not including either a mortgage or a deed of grant, uses this language:

"And all other instruments excepting wills shall be registered by the deposit of the original instrument or by the deposit of a duplicate or other original part thereof with all the necessary affidavits."

It has been argued that the above is affected by the heading under which section 27 appears, which heading reads: "Evidence and requisites for registration." I cannot see how any part of the language quoted above, except the final words "with all the necessary affidavits," can be held to refer to *evidence* for registration. It does comply with the word "requisites" in so far as directing that the instrument shall be registered by the deposit of the original, or of a duplicate, or other original part.



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Section 49 of the Act, in so far as applicable to present case, says that instruments "shall be registered by the production to the Registrar of the original instrument when but one is executed, or, when such instrument is in two or more original parts, by the production of one such part."

The heading under which sections 49 to 56 appear—"Registration—Duties and Entries of Registrar."—section 49 expressly purports to say what shall constitute "registration," and, in so doing, adds, to the words already quoted, nothing applicable to the case of a mortgage. The sections that immediately follow 49 refer to "duties and entries." None of them purport to add anything to the requisites of registration stated in section 49 unless section 50 does, which I shall presently consider.

I take it that "deposit" in section 27 and "production" in section 49 mean the same thing.

In the present case it is apparent, from the facts, that the certificate was afterwards put on without any further action by Siemens than producing the mortgage to the Registrar, depositing it with, the Registrar on 26th April, that Siemens so produced or deposited it for the purpose of having it registered, and that the Registrar, at the time Siemens so producing or depositing it, received it for the purpose of registration.

Dealing with this case, it is only necessary to consider that condition of affairs, and I express no opinion as to what would be the position if the mortgage had been produced to, but not received by, the Registrar. I further express no opinion as to the effect of non-payment of fees by the party producing, or depositing, an instrument. In this case the money to pay the fees was already in the hands of the Registrar.

The difficulty arises under section 50, which provides for the Registrar, upon production of the instrument, to indorse the certificate provided by the Act, and



tioning therein the year, month, day, hour and minute *in which such instrument is registered*, and the number of registration, followed by the words "and when such certificate is so indorsed and signed by the Registrar upon the original or any duplicate original \* \* \* the instrument or document bearing such certificate shall be deemed to be registered as of the time mentioned in such certificate; which certificate shall be taken and allowed in all Courts as *prima facie* evidence of the registration."

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J.A.

It will be noticed that there is a provision that, when the certificate is indorsed, the instrument shall be deemed to be registered as of the time mentioned in it (the certificate), and that there is a separate provision that the certificate shall be, in all courts, *prima facie* evidence of the registration. It is argued that, because of these separate provisions, we should not treat them as both referring to evidence, but should consider the first one as stating a requisite of registration, and the second as making the certificate evidence. It is contended that, otherwise, these consecutive clauses would simply mean the same thing, and the second would be a useless repetition of the first.

On the other hand, there is to be considered the policy of the Act, to enable people to protect themselves by their own diligence, and the express provisions, quoted above, of sections 27 and 49. These distinctly state that instruments, such as are in question here, shall be registered by the deposit of the instrument, or by the production to the Registrar of the instrument, which I think mean the same thing. They do not refer to any other action as requisite to, or forming part of, the registration.

Section 50 does not say that the Registrar is to state in the certificate the date of his putting the certificate on the instrument, but that he is to state in it the date of "registration," which would imply that, at the time of

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the putting on of the certificate, registration previously taken place. The words, "shall be deemed to be registered as of the time mentioned in such certificate," would, even without sections 27 and 49, be reasonably open to the interpretation of merely making the certificate a matter of evidence. They say that "it shall be deemed to be registered as of the time mentioned in the certificate." They do not say "as of the time of putting on of such certificate."

If I am right in the above, then the words, "the certificate shall be taken and allowed in all courts as *prima facie* evidence of the registration," do create the effect, a repetition of part of what is provided for by the previous clause. But, in view of the recognized principle of the law, that protection is to be got by diligence in the provisions of sections 27 and 49, I do not see how we can, because of a contrary construction created by the repetition, put upon section 50 the interpretation given by the learned trial Judge.

It seems to me that, in spite of section 50, the law as to what constitutes registration, has not changed, so far as it is applicable to this case, since the decision in *Harris v. Rankin*, 4 M.R. 115.

When that case was decided the only provision of the Registry Act, as to the effect of putting on the certificate of registration, was in the then section 32, which, providing (in words which, for present purposes, may be said to be similar, in effect, to those used in the present section 50) for its being put on the instrument, what it should state, used the further words: "the certificate shall be taken and allowed as evidence of the respective registrations in all courts."

It will be noticed that section 32 only made the certificate evidence of the fact that the instrument had been registered. The changes and additions made in, and to, the above quoted words by the present section 50

ly, it seems to me, intended—so far as registration is concerned—to make the certificate evidence of the time of registration as well as of the fact of registration.

With the utmost deference, I would allow the appeal with costs, and declare that the plaintiff's mortgage has priority over the deed to the defendant Long, and direct the taking of the usual foreclosure proceedings. If the defendant Long desires to redeem the mortgage, he shall, in addition to the mortgage money, pay the costs of the action and of this appeal. In case he does not redeem he shall pay the above costs less the costs that would have been incurred if he had not defended.

HAGGART, J.A. I agree that the appeal should be allowed. The mortgagee had done everything required by the statute. He produced the instrument and the Registrar had money in his hands for the fees. The statute R.S.M. 1902, c. 150, s. 49, says:

"All instruments that may be registered under this Act shall be registered by the production to the registrar of the original instrument."

This is in no way modified or qualified by the following section 50, which directs the indorsement of the certificate and enacts that "when such certificate is so indorsed and signed by the registrar \* \* \* the instrument or document bearing such certificate shall be deemed to be registered as of the time mentioned in such certificate."

I cannot read the statute that the indorsement of the certificate was necessary to constitute registration. Any other interpretation would leave the property rights of registered owners liable to be defeated by a dishonest or incompetent official, which was not the object or intention of the Legislature.

The mortgage was registered prior to the deed to the defendant Long.

HOWELL, C.J.M., PERDUE, J.A., and CAMERON, J.A., concurred.

*Appeal allowed.*

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Judgment.  
RICHARDS,  
J.A.

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## COURT OF APPEAL.

## SNYDER V. MINNEDOSA POWER CO.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, JJ.A.

*Staying proceedings—Judgment for plaintiff—Counterclaim pending—  
Delay in bringing counterclaim to trial—Practice.*

As a general rule when the plaintiff has judgment in his favor, but the defendant's counterclaim stands over for trial, proceedings on the judgment will be stayed until the counterclaim has been disposed of; but, when the plaintiff's judgment has been outstanding for a year or more and the defendant has not brought on his counterclaim for trial and is unwilling to undertake to bring it on at the next sittings of the Court, there should be no further stay of proceedings.

DECIDED: 6th October, 1913.

**Statement.** APPLICATION on behalf of the defendants for an order restraining the plaintiffs from making a seizure under, or enforcing, an execution issued on a judgment obtained by them herein, until after the trial of the counterclaim herein.

The following judgment at the hearing was delivered by

GALT, J. The application originally came before me on August 7th, when it appeared that the plaintiffs had recovered judgment against the defendants on or about the 21st day of May, 1912, for the sum of \$3,600 without costs. The judgment further ordered that plaintiffs be at liberty to withdraw all claims sued for in this action outside of the estimate of August, 1911, without prejudice to any further action they may be advised to bring in respect thereof.

It appeared on the material and argument before me that the plaintiffs had a further claim against the defendants and that the defendants desired to give evidence on their counterclaim of damages arising since the date of said counterclaim.

Under these circumstances, I thought it reasonable that the proceedings on the judgment should be stayed until

the next sittings of the Court at Minnedosa, when the counterclaim might be tried, and I understood that counsel for the defendants expressed his willingness to undertake that the counterclaim should be tried at said sittings. An order was accordingly drawn up and signed in accordance with the above decision, and was served upon the plaintiffs' solicitors but was subsequently withdrawn by said defendants' agents and objection was taken to the clause which I had inserted in the order embodying the undertaking which I understood the defendants' counsel gave.

Shortly afterwards I was attended by counsel for the defendants, who stated that, rather than accept the order with the undertaking above referred to, the defendants would prefer abandoning the order altogether, and I intimated my willingness that this should be done provided the plaintiffs consented. The plaintiffs apparently did consent, because shortly afterwards the Sheriff attempted to execute the writ of execution and, as I understand, he is still in possession of some of the defendants' goods.

The parties have now again appeared before me with a view to finally disposing of this matter upon the basis that my order made on August 7th be entirely eliminated.

If this had been the ordinary case of a judgment having been pronounced in favor of the plaintiff, but the defendant's counterclaim standing over for trial, I would have adopted the practice followed in one or more cases cited to me, to stay proceedings on the judgment until the counterclaim had been disposed of; but in this case the plaintiffs' judgment has been outstanding for a year or more, the defendants have not seen fit to bring on their counterclaim for trial, and even now they are unwilling to undertake to have the counterclaim tried at the next sittings of the Court in Minnedosa.

Under such circumstances I do not think they are en-

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titled to any further stay and I must dismiss this application with costs, including the costs of the proceedings before me in August last, to be taxed and added to the plaintiffs' judgment debt.

Defendants appealed.

*F. M. Burbidge* for defendants, appellants.

*J. W. E. Armstrong* for plaintiffs, respondents.

THE COURT dismissed the appeal without calling upon the respondent's counsel.

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#### RURAL MUNICIPALITY OF THOMPSON V. BRETHOUR.

Before MATHERS, C.J.K.B.

*Fi. Fa. Goods—Priority—Rateable distribution of money realized by Sheriff—Executions Act, R.S.M. 1902, c. 58, s. 25—Creditor's lien for costs—Assignments Act, R.S.M. 1902, c. 8, ss. 8, 9.*

Under section 25 of The Executions Act, R.S.M. 1902, c. 58, a sheriff who realizes any money under a writ of execution is bound to give notice thereof forthwith in the Manitoba Gazette and to keep the money for three months and then to distribute it rateably among all persons having unsatisfied executions in force in his hands at that time, and it makes no difference that the execution is for costs only. A Judge has no jurisdiction to make an order in the face of the statute for the Sheriff to pay over the money without waiting for the expiration of the three months.

*Thordarson v. Jones* (1908), 18 M.R. 223, explained as being only a decision to the effect that, when an execution debtor has made an assignment for the benefit of his creditors under the Assignments Act, R.S.M. 1902, c. 8, the assignee has no right to demand possession of the property seized by the Sheriff without payment to him of his own and the execution creditor's costs, as the statute gives a lien for them.

*Semie*—The Sheriff, on receipt of the amount of such costs, would be bound to observe the provisions of section 25 of the Executions Act, before paying over the money.

DECIDED: 21st October, 1913.

Statement.

UPON an execution against one Oscar B. Brethour, placed in his hands by the Rural Municipality of Thompson, the Sheriff of the Eastern Judicial District



realized the sum of \$282.10. The execution was for costs only.

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The Sheriff proposed to retain this money for three months and advertise it as required by section 25 of The Executions Act, R.S.M. 1902, c. 58, unless ordered by a judge to pay it over at once. The Municipality applied for such an order.

*F. M. Burbidge* for the applicant.

MATHERS, C.J.K.B. The application in this case is based upon the fact that the money in the Sheriff's hands is for costs only. I am informed that orders of this kind have been made on several occasions, and one recently made by my brother Galt was mentioned. I have spoken to my brother Galt and he informs me that in making the order referred to he believed he was following a judgment of my own in *Thordarson v. Jones*, 18 M.R. 23. I probably did not in that case express my meaning as clearly as I should have done. All that was before me, and all that I intended to decide in *Thordarson v. Jones*, was that, as against an assignee for creditors under The Assignments Act, the lien which an execution creditor has upon the debtor's goods, by virtue of having placed his execution in the Sheriff's hands, is preserved to him by section 8 of The Assignments Act to the extent that the execution is for costs, and that the Sheriff is not bound to hand over to the assignee goods which he has seized under the execution until he has been paid his own and the execution creditor's costs. I still adhere to the opinion, which I intended to, but probably did not clearly, express in that case. It did not deal with the question of what disposition the Sheriff should make of the money after it has come to his hands. After the money has been realized it is to be dealt with as directed by section 25 of The Executions Act. That section says that, when the Sheriff "realizes any money under a writ of execution," he shall publish notice thereof in the

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MATHERS, thereafter "hold the said moneys for a period of three  
C.J. months," at the expiration of which time he shall distribute these and any other moneys realized on other executions against the same debtor "rateably amongst the persons having unsatisfied executions in force in the said Sheriff's hands at the date of distribution."

The Assignments Act, R.S.M. 1902, c. 8, provides for a rateable distribution of all the debtor's assets amongst all his creditors whether they have judgment and execution or not. The Executions Act, R.S.M. 1902, c. 58, only provides for rateable distribution amongst execution creditors having executions in the Sheriff's hands. Section 8 of the former Act preserves to the execution creditor the lien that he has acquired by placing his writ in the Sheriff's hands to the extent of his costs as against the assignee. The lien exists only because the creditor has an execution in the hands of the Sheriff (Executions Act, s. 11), and only as against the assignee for creditors. If he withdrew his execution from the Sheriff's hands after the assignment, his lien would be gone and he could not then claim his costs as a preferential creditor: *Gillard v. Milligan*, 28 O.R. 645. When there has been no assignment section 8 of The Assignments Act does not apply. There is no other provision in either that Act or the Executions Act which creates in favor of an execution creditor a preferential claim for his costs of suit, or which differentiates in any way between the part of the execution creditor's claim which is for costs and that part of it which is for debt. It is argued that it would be most unfair that the costs which a plaintiff has incurred, when realized by the Sheriff, should be distributed *pro rata* amongst other execution creditors. I agree that the question is one which might well receive the attention of the Legislature. It was probably thought that, as the distribution was to be only amongst execution



creditors, the costs of all would be about equal. and that nobody would suffer by bringing all into hotchpot. The debts, however, might greatly vary in amount, which would make the distribution as to costs unequal. It seems to me a more just and equitable provision would be to make all the execution creditors' costs payable as preferential claims (*pro rating* them in case of a deficiency) and to distribute the balance in proportion to the debts only.

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I can see nothing which, in the absence of an assignment, entitles an execution creditor to be paid his costs as a preference claim or to be paid such moneys before the time for distribution fixed by section 25 of The Executions Act. I may add that, in my opinion, a Judge has no power to relieve the Sheriff from the necessity of holding all moneys realized by him for the prescribed time and of then distributing them as directed, and an order purporting to do so would be no protection to him.

What I have said does not, of course, touch the question of a solicitor's lien for costs. If the application were by the solicitor by whom the judgment was recovered to have it declared that he had a lien upon the moneys, different considerations entirely might arise.

The application for an order to the Sheriff to pay over the moneys in question must be refused.

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## RE CRICHTON ESTATE.

Before MATHERS, C.J.K.B.

*Will—Rule against perpetuities—Manitoba Trustee Act, R.S.M. 1902, c. 170, ss. 42-47—King's Bench Act, Rules 994 et seq.—Application for advice, opinion or direction of Judge—Originating notice.*

A direction in the will of a testator to pay income to his named children during their lives or, in the event of the death of any of them leaving issue, then to pay the parent's share to such issue in equal shares *per stirpes* is not void for remoteness under the rule against perpetuities, because all the persons to whom income is directed to be paid must be ascertained and the interests conferred upon them become vested within twenty-one years from the expiration of the lives in being.

For the same reason, a direction, in the event of any child dying without issue leaving a husband or wife in needy circumstances, to pay a proportion of the income to such needy husband or wife, does not offend against that rule.

*Hale v. Hale*, (1876) 3 Ch.D. 643; *Pearks v. Moseley*, (1880) 5 A.C. 714, and *Seaman v. Wood*, (1856) 22 Beav. 591, distinguished, because the wills in those cases contained provisions postponing the vesting of the interests conferred to a period which might be beyond the period allowed by the rule.

A future interest created by a will is not obnoxious to the rule if it begins or becomes vested within the proper period, although it may end beyond it: *Gooch v. Gooch*, (1851) 14 Beav. 565; 3 De G. M. & G. 366, and *Stuart v. Cockerell*, (1869) L.R. 7 Eq. 363, 5 Ch. 713.

A Judge has no jurisdiction, upon an application under sections 42 to 47 of the Manitoba Trustee Act, R.S.M. 1902, c. 170, to give his opinion, advice or direction as to whether a legacy in a will is void as violating the rule against perpetuities.

*Re Lorenz*, (1861) 1 Dr. & S. 401; *Re Hooper*, (1861) 29 Beav. 656; *Re Williams*, (1877) 1 Ch. Ch. 372, and *Re Rally*, (1911) 25 O.L.R. 112, followed.

But a Judge may decide such a question in a proceeding commenced by originating notice under Rules 994 *et seq.* added to the King's Bench Act by 3 Geo. V, c. 12: *Re Carlyon*, (1886) 35 W.R. 155; *Re Davies*, (1888) 38 Ch. D. 210; *Re Royle*, (1889) 43 Ch. D. 18; *Re Whitty*, (1899) 30 O.R. 300, and *Re Wilson*, (1885) 28 Ch. D. 461, and by consent of parties a petition for advice under the Trustee Act may be turned into a proceeding by originating notice under said Rule 994.

DECIDED: 17th July, 1913.

**Statement.** APPLICATION for the opinion, advice or direction of a Judge under The Manitoba Trustee Act, R.S.M. 1902, c. 170, sections 42 to 47.

The questions upon which an opinion was required were as to whether, or not, certain legacies under the will were void as violating the rule against perpetuities. 1913  
Statement.

*E. A. Cohen* for legatees.

*R. W. McClure* for executors.

*A. Sullivan* for infants.

MATHERS, C.J.K.B. Section 42 of The Manitoba Trustee Act, R.S.M. 1902, c. 70, is similar to section 30 of the Imperial Act, 22-23 Vic., c. 35, commonly called Lord St. Leonard's Act. Under that Act Vice Chancellor Kindersley decided in *Re Lorenz*, 1 Dr. & S. 406, that the Court had no jurisdiction to determine the rights of parties. He there said:

"My understanding of that section of the Act is that it was intended by the Legislature that the Court should have the power to advise a trustee or executor as to the management or administration of the trust property in the manner which will be most for the advantage of the parties beneficially interested, but not to decide any question affecting the rights of those parties *inter se*; otherwise the effect would be that a deed or will involving the most difficult questions, and relating to property to an amount however large, might be construed and most important rights of parties decided by a single Judge without any power of appeal whatever. This I am satisfied that the Legislature never intended. . . . It is true that in some cases the Court has (unadvisedly as I think), upon a petition under this section, given its opinion affecting the rights of parties; but I believe that the Judges generally now consider that it ought not to be done."

In *Re Hooper*, 29 Beav. 656, Sir John Romilly, M.R., expressed the opinion that the object of this section of the Act was to assist the trustees as to little matters of discretion only.

Under the Ontario Act, which is the same as ours and the same as the English Act, Vice Chancellor Mowat, upon the authority of these cases, arrived at the same

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conclusion in *Re Williams*, 1 Ch.Ch. 372, and the most recent decision upon the point is by Mr. Justice Riddell, in *Re Rally*, 25 O.L.R. 112.

The cases are collected in an editorial in *The Canadian Law Times*, Vol. 17, p. 287.

There appears to be no doubt at all that a Judge has no jurisdiction to answer the questions asked in this application under The Trustee Act.

It may be that, under the new originating notice rules, commencing with 994, passed at the last session of the Legislature, there is power to construe this will. The new Manitoba rule is the same as English Order 55. Rule 3, and Ontario Rule 938. It was decided in *Re Carlyon*, 35 W.R. 155, that English Order 55, Rule 3, applied only to questions and matters which, before the order was made, would have been determined by an action for the administration of the estate.

That case was followed in *Re Davies*, 38 Ch.D. 210, and was approved by the Court of Appeal in *Re Royle*, 43 Ch.D. 18. The same interpretation was put upon the Ontario rule in *Re Sherlock*, 18 P.R. 6, followed in *Re Whitty*, 30 O.R. 300.

In this latter case Chief Justice Meredith states that the Ontario rule is wider than the English rule in that the former gives jurisdiction for the determination of any question arising in the administration of the estate or trust. He seems, however, to have overlooked the fact that English sub-rule (*g*) is exactly the same as Ontario sub-rule (*h*). He also observes that the rule was intended to save the expense of administration of an estate and ought to be liberally construed, so as to include every case that can reasonably be brought under the operation of its provisions.

The question of whether or not our new rules are wide enough to include the application in this case is not

before me, as the application was by petition under the Trustee Act. If, however, the parties consent to turn the petition for advice into a notice of motion under Rule 994, I will hear counsel as to whether or not that rule is wide enough to give the petitioners the relief they ask; and, if I am satisfied that it is, I will consider the application on the merits as though the application had been made by originating notice.

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On a subsequent day all parties appeared before me in Court and by consent the petition for advice under The Trustee Act was turned into an originating notice under Rule 994.

I have now heard argument which convinces me that I have jurisdiction under this Rule to determine the questions submitted in this petition. The Rule provides that the Court may determine any question arising in the administration of the estate. Speaking of a similar rule in England, Pearson, J., in *Re Wilson, Alexander v. Calder*, 28 Ch.D. at 461, said:

"The rule, as I understand it, is this: that, if there be a simple question as to whether or not a legacy has failed, \* \* \* or any isolated question of that kind the decision of which would at once set at rest all differences between all the parties taking under the will \* \* \* the Court ought to decide those questions separately and apart from any administration."

The substantial question to be decided here is whether or not a life interest to grand-children or to a necessitous husband or wife of a child is void as violating the rule against perpetuities, and is, I think, covered by the language of Pearson, J., above quoted.

By her will the testatrix, after giving certain specific legacies, devised all the residue of her estate, real and personal, to trustees, with a direction to convert the same into money, or to leave unconverted, as they may see fit, and, out of the moneys to arise from the sale or conver-

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sion, to pay funeral and testamentary expenses and to invest the residue upon such securities as they may think proper. It then goes on to direct how the income to arise from such investment shall be applied. It first provides for payment of the premium of a life insurance policy upon the life of one of her sons, which, however, lapsed during her life, so that direction cannot be carried out.

Secondly, "to pay the balance of the said income amongst and between my said daughters Sarah Sherwin Barber and Anne Chatburn Crichton, and my sons William Madeley Crichton and John Crichton, in equal shares during their respective lives, and, in the event of any of my said children dying at any time, either during my lifetime or afterwards, leaving a child or children, then such child or children shall inherit and take the share which his, her or their parent should have been entitled to in equal shares *per stirpes*. It being my will that my children who shall be the objects of this trust shall take in equal shares and the children, objects of this trust, of any child of mine dying at any time, either during my lifetime or afterwards, shall take equally between them the share which the parent would have taken had he or she survived me or to which such parent was entitled at the time of his or her death. And, in the event of any of my children dying without issue and not having a husband or wife her or him surviving (which event is hereinafter provided for) then the share of such child or children so dying shall go to the survivor or survivors of them in equal shares during her or his or their lives. And it is my will that, if my said children shall die without issue, leaving a husband or wife unprovided for and in needy circumstances and requiring financial assistance for his or her maintenance and livelihood, that my trustees shall pay to such husband or wife during his or her lifetime, and only while he or she remains unmarried, a sum which shall not exceed one-sixteenth of the net income yielded and being derived by my trustees from my estate at the time of such payment, the same to be paid in half-yearly instalments."

The testatrix died on the 9th day of June, 1908, leaving surviving her two sons and two daughters. The

two sons were married but neither of them had issue; one daughter was married and at the time of testatrix' death had two sons and two daughters; the other daughter was unmarried. Since the testatrix' death the wife of one of the sons has died, and there has been born to the other son a daughter.

The questions to be determined are: firstly, whether the direction in the will to pay the balance of the income arising from the investment of the estate by the trustees to the four children of the testatrix during their lives, or in the event of the death of any of them, either before or after the death of the testatrix, leaving issue, that such issue should take the parent's share in equal shares *per stirpes*; and secondly, whether, in the event of any child dying without issue leaving a husband or wife in needy circumstances, the direction to pay to such needy husband or wife one-sixteenth of the income during life, or until re-marriage, are void for remoteness under the rule against perpetuities.

The will disposes of the corpus of the estate in trust for the payment of the income so long as there shall be any of the objects of the testatrix' bounty entitled to receive it. No disposition has been made of the estate after the expiration of the trust, and it must then go to the next of kin as in an intestacy. If all the persons to whom income is directed to be paid must be ascertained and the interests conferred become vested within twenty-one years from the expiration of the lives in being, then the rule against perpetuities is not violated.

Take the case of the direction to pay income to the children. That of course is perfectly good, because they are all in being. Then, what about the direction to pay to the issue of a child dying either before or after the testatrix? Such children must be *in esse*, or at least begotten, during the lifetime of the parent child, so that such class must be ascertained well within the period

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fixed by the rule. One of the sons is now a widower, one of the daughters is still unmarried; they may each marry a person who has not been born at the testatrix' death, and by such marriage they may have a child or children, and afterwards die, and such child or children become entitled to the parent's share. But, as I have before pointed out, such child must be at least begotten during the lifetime of the parent whose share it takes, and therefore, its share would vest long before the expiration of twenty-one years from the death of its father or mother.

The same may be said of the needy husband or wife bequest. A limitation of a life interest to a surviving husband or wife of a person *in esse*, to whom an estate for life is at first conveyed, is not too remote, for the reason that, though such surviving husband or wife may be unborn at the time the interest to him or her is created, the estate must of necessity vest in such person during the existence of the preceding estate.

A future interest is not obnoxious to the rule if it begins within the proper period, although it may end beyond it; in which case, if it is a limited interest, it may tie up the property for more than twenty-one years beyond the life in being: *Jarman on Wills*, 301 and 348; *Gooch v. Gooch*, 14 Beav. 565, and in appeal, 3 De G. M. & G. 366; *Gray on Perpetuities*, par. 241, 244; 22 *Am. & Eng. Encyc.* 711; *Stuart v. Cockerell*, L.R. 7 Eq. 363, 5 Ch. 713.

The executors relied upon *Hale v. Hale*, 3 Ch.D 643; *Pearks v. Moseley*, 5 A.C. 714, and *Seaman v. Wood*, 22 Beav. 591, but these cases are easily distinguishable. In *Hale v. Hale* a testator gave his real and personal estate to trustees upon trust for his wife during widowhood and after her death or second marriage for his children who might be living at such death or second marriage, and the issue of any child who might have previously died, such issue to take the share of his or her deceased



parent in equal shares, the share of such of his children or grandchildren as should be a son or sons to become vested in or payable to them as and when he or they should respectively attain the age of 24 years. It was there quite clear that any of the children might have died leaving issue less than three years old, and the share was not to become vested until they reached 24, and therefore might not vest until the lapse of more than 21 years after the expiration of the life in being. That that was the ground of the decision of the Master of the Rolls is shown at page 646, where he says: "The result might be that a child might die in the lifetime of the widow or before her second marriage, leaving a son under the age of one year. The widow might then die or marry and such son might not attain 24 years of age within the legal period, and consequently could not, within that period, ascertain the class to take, for that is the important point."

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*Pearks v. Moseley*, 5 A.C. 714, may be distinguished in the same way. In that case the income of the sum of \$3,000 was given to trustees in trust for all the children of the testator's daughter who should attain the age of 21 years, and the lawful issue of such of them as should die under that age "leaving issue at his, her or their decease or respective deceases, which issue shall afterwards attain the age of 21 years or die under that age leaving issue at his, her or their decease respectively, as tenants in common, if more than one, but such issue to take only the share or shares which his, her or their parent or parents respectively would have taken if living."

Now there the children of the daughter were the lives in being, and a gift to such children and their issue who should attain 21 years of age would be undoubtedly good, because the gift would necessarily vest not later than 21 years from the death of the daughter; but the will also provided that, not only should the children of the testator's daughter take, but the issue of such children and

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their issue in the event of their having issue and dying before 21 years of age. Had the will stopped there, the gift would have been good, because, the children of the daughter being the lives in being, their children who had issue and died before 21 leaving issue would all take place within the period allowed by the rule, and the share of the last named issue would vest within 21 years from the expiration of the life in being. But the will did not stop there; it said that the share of the last named issue should not vest until they had attained the age of 21 years, which might be at a time beyond 21 years from the expiration of the life in being.

On that point Lord Chancellor Selborne says, p. 719:

"If you could find in this will a gift simply to 'all the children of' the testator's daughter who shall attain the age of twenty-one years and the lawful issue of such of them as shall die under that age leaving lawful issue, his, her or their decease or respective deceases \* \* you could find a gift in those terms, unqualified by anything which afterwards follows, no doubt there would be no remoteness. All the shares would necessarily be ascertained within due limits of time. \* \* But in the case, if there was no law of remoteness, I am satisfied that no Court would be justified in omitting the qualification which follows, or refusing to treat that qualification as entering into the description of the issue who are to take; 'which issue shall afterwards attain the age of twenty-one years' and so on. It is, to my mind, the same thing in effect as if the testator had expressed himself thus: 'For all the children of my said daughter who shall attain the age of twenty-one years, and the issue who shall live to attain that age of such of them as shall die in minority.' If that were so, there can be no question that the gift to the issue would be void for remoteness."

In the case of *Seaman v. Wood*, 22 Beav. 591, the testatrix devised property in trust for her son for life and after his death upon trust for the children of her son who being sons, should attain twenty-one years of age, or

being daughters, should attain that age or marry, and also each child or children of any son of her son who should be under the age of twenty-one years, as, being a male or males, should reach twenty-one years of age, or, being a male or females, should reach that age or marry. There the life in being was that of the son and a gift over after his decease to any grandchild who should attain twenty-one years of age would be perfectly good, so also would a gift over to any child of such grandchild who died under twenty-one; but the vice in the bequest consisted in the added condition that the share of such great-grandchild should only vest when it attained twenty-one years of age, which might, of course, be long beyond the period fixed.

In my opinion both bequests are valid and, therefore, the first two questions must be answered in the affirmative.

Costs of all parties represented to be paid out of the estate.

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## COURT OF APPEAL.

### GOOD V. BESCOBY.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, JJ.A.

*Vendor and purchaser—Specific performance—Authority to agent—  
Misrepresentation of name of purchaser—Ratification—Statute of  
Frauds.*

Plaintiff claimed specific performance of an agreement by defendant to sell him a farm. The agreement was in the form of a receipt for \$100 on account of the purchase money, providing for payment of the balance, \$2,300, in cash five weeks afterwards and signed by one Arundel as agent of defendant.

The defendant disputed Arundel's authority to make the sale to the plaintiff. He also contended that he would not have sold to the plaintiff if he had known who the purchaser was and that the plaintiff had fraudulently concealed this from him.

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Arundel was a solicitor practising in Stonewall and had generally acted in that capacity for the defendant who lived in Winnipeg; but the land in question had not been listed with him for sale nor was he, prior to the telephone conversation below mentioned, in any sense the defendant's agent.

At the request of one Nelson sent by the plaintiff, who was a resident of Stonewall, Arundel called up the defendant on the telephone and got from him the information that the land was for sale and his lowest price and terms—namely \$2,400 cash.

During this conversation, at which Nelson was present, defendant asked who the purchaser was and Arundel said: "It is a Winnipeg man," in consequence of an ambiguous answer made by Nelson to the question when it was repeated to him. Shortly afterwards the plaintiff called upon Arundel, paid the \$100 and got the receipt above referred to. Arundel the same evening (Saturday) called defendant on the telephone and told him the land was sold, that he had received the \$100 and that the balance was to be paid in cash within a month, but did not mention the purchaser's name. Defendant agreed to the terms and did not ask who the purchaser was. A few minutes later, defendant called up Arundel and asked who the purchaser was and was told it was the plaintiff. To this defendant made no reply except a surprised exclamation "Oh!" and it was not until the following Monday morning that he called up Arundel and repudiated the sale and said he would not sell to a Stonewall man. No reason was shown why the defendant should not have been as willing to sell to the plaintiff as to anyone else, beyond the fact that he had some months previously offered the land to the plaintiff for \$3,000 and that the plaintiff had refused to purchase at that price.

Upon the evidence the trial Judge decided that he could not find that the plaintiff knew that the defendant would not sell to him or that there was any personal reason why the plaintiff should be objectionable to the defendant as a purchaser, or that the plaintiff had been guilty of any fraud or deception inducing the contract or that the defendant would not have entered into it had he been aware that the plaintiff was the purchaser.

*Held*, on appeal from the decision of Curran, J., at the trial, adopting his findings of fact as to what the defendant had done:

- (1) There was not sufficient evidence to show that the defendant had given Arundel any authority to enter into the contract of sale as his agent and to bind him by signing the receipt relied on, or to do more than to communicate to the person making the inquiry the price and terms on which he was willing to sell.

*Hamer v. Sharp*, (1874) L.R. 19 Eq. 108; *Bradley v. Elliott*, (1906) 11 O.L.R. 398; *Prior v. Moore*, (1887) 3 T.L.R. 624, and *Harvey v. Facey*, [1893] A.C. 552, followed.

- (2) The defendant's acts did not amount to a ratification of the act of Arundel in signing a document containing, not only a receipt for the \$100, but also a binding contract of sale. This was the act

which required ratification in this case, and to establish ratification there must be clear adoptive acts or acquiescence equivalent thereto, accompanied by full knowledge of all the essential facts. The defendant knew that Arundel had assumed to sell the land and had given a receipt for the deposit, but not that he had assumed to sign a contract of sale binding on him.

- (3) The Statute of Frauds, therefore, constituted a good defence to the action which should be dismissed with costs.

*Per* PERDUE, J. A. Under the circumstances, the misrepresentation made to the defendant, although innocently, by Arundel, that the purchaser was a Winnipeg man, was material and he should not be bound by the assent he gave to the sale before the truth had been communicated to him. After he learned that the plaintiff was the purchaser, he did nothing in the way of ratification and had a right to repudiate the sale within a reasonable time, which he had done.

*Fry on Specific Performance*, 5th ed., pp. 107, 108, followed.

DECIDED: 21st October, 1913.

ACTION for specific performance of an agreement of Statement. sale. The facts are set out at length in the head note.

*J. B. Coyne* for defendant, appellant, cited *Clough v. London & N.W. Ry.*, 41 L.J.Ex. 17, 22; *Morrison v. Universal*, 42 L.J.Ex. 115, 119; *Gordon v. Street*, [1899] 2 Q.B. 641; *Kelly v. Enderton*, 22 M.R. 286, *Archer v. Stone*, 78 L.T.R. 34; *Fry on Specific Performance*, Can. ed. pp. 107, 108; *Phillips v. Duke of Bucks*, 1 Ver. 227; *Halsbury*, vol. 1, p. 166; *Clermont v. Tasburgh*, 1 Jac. & W. 112, 119; *Cadman v. Horner*, 18 Ves. 10; *Gunn v. Roberts*, L.R. 9 C.P. 335; *De Bussche v. Alt*, 8 Ch. D. 286; *Banque Jacques-Cartier v. Banque de Montreal*, 13 A.C. 111; *The Bonita*, 5 L.T.R. 141; *Wall v. Cockerell*, 10 H.L.Cas. 229, and *Halsbury*, vol. 13, p. 166.

*A. B. Hudson* and *A. E. Dilts* for plaintiff, respondent, cited *Nash v. Dix*, 78 L.T. 445; *Smith v. Wheatcroft*, 9 Ch. D. 223; *Williamson on Vendor and Purchaser*, 2nd ed., vol. 1, p. 760; *Fellowes v. Gwydyr*, 1 Sim. 63, 1 Russ. & M. 83; *Hilbery v. Hatton*, 2 H. & C. 821; *Fitzmaurice v. Bayley*, 26 L.J.Q.B. 114; *Marsh v. Joseph*, [1897] 1 Ch. D. 213; *Brown v. Wilson*, 23 S.E.Rep. 630; *Wallace v.*

1913 *Telfair*, 2 T.R. 188 (note); *Ireland v. Livingston*, L.R.  
Argument. 5 H.L. 416, and *Meecham on Agency*, sec. 169.

HOWELL, C.J.M. The question of agency in this matter is one of fact.

Arundel, the agent, was called by the plaintiff as a witness and the case really turned on his evidence. He was apparently not asked if he had authority to sell the land or to sign an agreement for sale, and in no place in the evidence did he state that he had any such authority. The defendant was called as a witness on his own behalf and in no place was he asked, nor did he anywhere in the evidence state, that he had or had not given Arundel authority to sell the land or to execute an agreement in writing for the sale of it.

Arundel is a solicitor and apparently ordinarily acts for the defendant and his family in legal matters. The evidence shows that at the request of Nelson, the agent of the plaintiff, the solicitor called up the defendant by telephone and asked him about the land in dispute, got his lowest price for cash and told him the contemplated purchaser was a Winnipeg man, but neither of the two, in giving their evidence as to this conversation, says one word about any authority given in any way to the solicitor. The next day the solicitor signed a receipt in writing in which he assumes to act as agent for the defendant; this writing amounts to an agreement for sale of the land by the defendant to the plaintiff and is sufficient under the Statute of Frauds.

A few hours later the solicitor called up the defendant by telephone and told him that "the deal was closed and I had got \$100." "He agreed to the terms." Counsel for the defendant asked the solicitor the following question: "You told him the sale had gone through?" Answer: "Yes." The defendant in his version of this conversation with the solicitor says: "He said 'I have sold your land', and he said 'I have accepted \$100 on it.'"

The solicitor that evening wrote a letter to the defendant enclosing his cheque for \$100, the deposit and stating: "I have to-day taken a deposit of \$100 from W. R. Good on account of the purchase price of (setting forth the land). The total price paid being \$2400. This is in accordance with your telephone talk with me last night," and later follows this statement, "I am charging your account with \$10, my fee for negotiating the sale as arranged with you over the telephone."

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From the evidence, correspondence and subsequent acts of the parties, I would certainly come to the conclusion and find as a fact that the defendant in the first telephone conversation did authorize and employ the solicitor to do something with reference to this land. If he authorized the solicitor to sell the land, stating the price and terms, then, on the authority of *Rosenbaum v. Belson*, [1900] 2 Ch. 267, the solicitor was empowered to make a sale which is effectual in point of law, and where a writing is required it will authorize him to sign the writing binding the vendor. In that case the authority was as follows: "Please sell for me my houses \* \* \* and I agree to pay you \* \* \* commission \* \* \* on the purchase price accepted."

In *Hamer v. Sharp*, L.R. 19 Eq. 108, the authorization was as follows: "I request you to procure a purchaser of the following freehold property and to insert particulars of the same in your monthly estate circular till further notice", and it was held that, the authority being merely to find a purchaser, the agent had no authority to sign a writing binding the vendor.

In *Bradley v. Elliott*, 11 O.L.R. 398, a real estate agent had some dealings with a lady respecting the sale of her real estate and he wrote to her in reference to it and used the following, amongst other, expressions: "Supposing I can get \$1200 cash, would you take it?" and to this she replied stating, amongst other things,

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"Now here is my best offer \$1275." As I read Sir John Boyd's judgment, the offer might have been accepted and perhaps bind her, but it did not give the agent authority to enter into a contract as her agent and bind her.

Apparently *Prior v. Moore*, 3 T.L.R. 624, decides that, where an owner instructed a real estate agent to enter the property in his books for sale and fixed the lowest price, the agent is not thereby authorized to enter into a binding contract of sale.

In *Harvey v. Facey*, [1893] A.C. 552, the plaintiff telegraphed the defendant, the owner, as follows: "Will you sell us Bumper Hall Pen. Telegraph lowest price." To which the defendant replied "Lowest price for Bumper Hall Pen £900." To this the plaintiff at once replied "We agree to buy Bumper Hall Pen. for the sum of nine hundred pounds asked by you." It was held by the Court of Appeal that the defendant's first telegram was merely a quotation of price and not an offer to sell and, as he had not accepted the offer in the plaintiff's last telegram, there was no contract. The same principle is followed in *Johnston v. Rogers*, 30 O.R. 150. However, this last mentioned case did not receive approval by Mr. Justice Riddell in *Bohan v. Galbraith*, 15 O.L.R. at 37. This last mentioned case, reported fully in 13 O.L.R. 301, shows how exactly the Court requires a clear agreement to sell on the part of the vendor to be established.

*Ryan v. Sing*, 7 O.R. 266, shows how critically Judge Ferguson searched to find authority for an agent to enter into a binding contract.

The onus is of course on the plaintiff to prove the agency, and it cannot be inferred simply because the agent acted.

I return to the consideration of the facts in their application to the law above referred to. Did the defend-



nt tell the solicitor merely his price and that he wanted  
sell or did he ask him to find a purchaser? Did he  
all the solicitor to enter the land in his books for sale,  
aving the price? Did the solicitor say to the defend-  
nt: "I want to act for you in the sale of this land, what  
your lowest price?" and suppose the only answer was  
My lowest price is \$2400." By none of the above sup-  
posed questions and answers alone was the solicitor  
authorized to sell the land so as to bind the defendant.  
rom the evidence given and from the acts of the parties,  
cannot infer that the defendant intended to authorize  
the solicitor to sell this land without reference again to  
him, when so many other inferences might be drawn and  
specially as the two parties to this conversation were  
alled and neither gave evidence upon this particular  
oint.

It has been argued that at all events the solicitor did  
gn the agreement as agent for the defendant, and that  
he latter ratified or confirmed it. The defendant was  
old over the telephone by the solicitor on Saturday even-  
ing at about 6 o'clock, that he had sold the land and had  
signed a receipt for the money and the defendant's  
answer was "All right." A few minutes later the de-  
fendant called up the solicitor and asked who the pur-  
naser was and, having been told it was the plaintiff, he  
answered "Oh," as if he were surprised, and this ended  
the conversation. On Monday morning, and before he  
ad received the solicitor's letter above referred to, the  
defendant called up the solicitor and repudiated the sale  
n the ground that he did not wish to sell to the plain-  
ff and he told the solicitor to return the money to the  
plaintiff.

To establish ratification there must be clear adoptive  
acts or acquiescence equivalent thereto, and this must  
be accompanied by full knowledge of all the essential  
acts. The act which requires ratification in this case is

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the signing of the written document. The only facts known by the defendant were that the solicitor had assumed to sell the land and had given a receipt for the purchase money. I think I am not bound to infer that, because the solicitor had assumed to sell without authority, the defendant should therefore know that he, without authority, also assumed to sign a written contract. The defendant was told that the solicitor had given a receipt for the money, but it cannot be that this is notice of a written contract to sell the land. The solicitor could properly give his personal receipt for the money and yet it would be far short of a document required by the Statute of Frauds.

Having come to the conclusion that the plaintiff has not met the defence of the Statute of Frauds, it is not necessary to discuss the other branch of the defence.

The appeal is allowed with costs and the action must be dismissed with costs.

PERDUE, J.A. This appeal turns upon the following questions:

(1) Had Arundel authority from the defendant to sign the receipt evidencing the terms of sale?

(2) If he had not this authority, was the sale afterwards ratified by the defendant so that it became binding upon him?

In regard to the first question, I think it is clear that, prior to the telephone conversation with the defendant on 23rd February, while Nelson was in Arundel's office, the latter had received no authority whatever to sell the land. The learned trial Judge so finds, and he finds also that Arundel up to a certain point was the plaintiff's agent and not the agent of the defendant. The trial Judge further says: "I think he (Arundel) became the defendant's agent when the defendant informed him the land was for sale and stated to him the price and terms upon which he was willing to sell." But it appears to

me that all one can safely gather from the conversation is that Arundel was authorized by the defendant to communicate to the person making the inquiry the price and terms on which the defendant was willing to sell. I am unable to find any evidence that Arundel was authorized by the defendant to conclude a sale or to sign anything which would bind the defendant.

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There being no authority to the agent to complete a sale, the validity of the sale must turn upon the question of ratification. During the conversation between Arundel and the defendant that took place over the telephone on the 23rd, while Nelson was in Arundel's office, the defendant asked Arundel, "who is it that is purchasing it?" Arundel then asked Nelson, "who is buying?" Nelson made a reply which seems to have given Arundel the impression that some person in Winnipeg was the intending purchaser. Arundel then answered the defendant's question by saying, "It is a Winnipeg man." At this time Arundel had no knowledge that the plaintiff was the intending purchaser, and he did not until the following day become aware of the fact that Nelson was acting for Good and that Good was the person who wished to buy.

No further communication occurred between the defendant and Arundel until after the latter had closed the sale to Good, received the deposit and signed the memorandum as agent for the defendant. This took place on 24th February. On the evening of that day Arundel called up the defendant on the telephone and informed him that the sale had gone through. Two conversations took place between these two men on the evening of the 24th, there being only a short interval between the two. They differ as to what was said in these two conversations; but, as the trial Judge appears to have taken Arundel's statement as to what passed, I shall assume that it correctly reported what was said. Arundel says that

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the defendant approved of the sale and was satisfied with the terms. The name of the purchaser was not mentioned at this conversation. A few minutes afterwards, the defendant called up Arundel again and asked the name of the purchaser. He was then informed for the first time that it was the plaintiff Good. Good lives near Stonewall, close to the land in question, and owns the adjoining farm. According to Arundel, when the defendant heard the name of the purchaser he said "Oh!" in a rather peculiar way, as if surprised. That was the only remark he made and nothing further occurred at that conversation.

On the evening of the 24th February Arundel wrote to the defendant reporting the sale and enclosing a cheque for the deposit received from the plaintiff. This letter was posted some time in the evening of the 24th, which was a Saturday. On Monday, at about half-past seven o'clock in the morning, and before he had received the letter, the defendant telephoned to Arundel repudiating the sale and saying he would not sell to a Stonewall man. Nothing had been done by the plaintiff on the faith of the alleged contract up to that time, except the payment of the deposit.

The plaintiff's case must rest wholly upon the alleged ratification by the defendant. There is no doubt that the defendant did, at the first conversation with Arundel on the 24th, assent to the sale as reported to him by Arundel. This assent was given with the information furnished to him by Arundel on the previous day still fresh in his mind. Part of this was that the sale was being made to a Winnipeg man. The defendant was willing to sell the land to a Winnipeg man but was not willing to sell it to a Stonewall man. This may have been a mere whim or fancy upon his part, but there is nothing to prevent a man from choosing the purchaser or

... of purchasers he will deal with or from declining  
sell to a particular man or class of men.

Ratification must be founded upon a full knowledge  
the facts: *La Banque Jacques Cartier v. City &  
strict Bank*, 13 A.C. 111, 118; *Phosphate Lime Co. v.  
een*, L.R. 7 C.P. 43, 57; *Marsh v. Joseph*, [1897] 1 Ch.  
3, 247. The exception to the rule is where it is shown that  
ere was an intention to adopt the act at all events and  
der whatever circumstances, but I find no evidence of  
ch an intention in this case.

It is argued that the defendant had all the knowledge  
at was material when he gave his assent to the sale as  
st reported to him by Arundel and that the one thing  
t disclosed to him, the name or description of the pur-  
aser, was immaterial. In support of this argument  
e cases of *Fellowes v. Gwydyr*, 1 Sim. 63; 1 Russ. &  
. 83; *Nash v. Dix*, 78 L.T. 445, and *Smith v. Wheat-  
oft*, 9 Ch. D. 223, were cited. The result of these and  
her cases bearing on that point is summed up by Sir  
Edward Fry in the following words: "The law now ap-  
ars to be that, where one person is deceived as to the  
al party with whom he is contracting, and *that*  
*deception either induces the contract* or renders its terms  
ore beneficial to the deceiving party or more onerous  
the deceived, or where it occasions any other loss or in-  
venience to the deceived party, there the contract  
cannot be enforced against him." *Fry on Spec. Per.*, 5th  
l., p. 107. The same learned author at page 108 quotes  
ith approval, as embodying the equity principle, the  
ollowing sentence from Pothier: "Whenever the con-  
deration of the person with whom I am willing to con-  
tract enters as an element into the contract which I am  
willing to make, error with regard to the person  
destroys my consent, and consequently annuls the  
contract."

In the present case it is quite clear that the defendant

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was deceived by the statement which was made to him, innocently no doubt, by Arundel, that the purchaser was a Winnipeg man. It must further be borne in mind that the contract was not one which the defendant himself made but it was one made for him, without previous authority, and which it is sought to force upon him as one that was ratified by him. I do not think that he can be bound by the assent he gave in the first conversation on the 24th, when the true facts had not been communicated to him. After he learned that Good was the purchaser, he did nothing in the way of ratification and within a reasonable time he repudiated the sale.

For the reasons I have given I think the appeal should be allowed with costs and the plaintiff's action dismissed with costs.

CAMERON, J.A. I take Mr. Arundel's account of the transaction as the statement of facts on which the plaintiff must recover, if he is to recover at all. Mr. Arundel says he asked Bescoby what was the lowest price he would take for the property in question and Bescoby answered that he would take \$3000 on time or \$2600 or \$2800 for cash. Mr. Arundel then pointed out that this figure was too high and that there would be no commission. There was then a discussion as to the purchaser and finally Mr. Arundel "got the price down to \$2400 net cash, no commission." Nelson (who was acting for Good) was to let Mr. Arundel know in a day or two whether the purchaser would take it on those terms. Now, there is not here or elsewhere in the evidence anything to show that Bescoby gave Arundel authority to sell (the burden of establishing which is on the plaintiff) with all that is therein implied. This case does not, therefore, come within *Rosenbaum v. Belson*, [1900] 2 Ch. 267.

The evidence on the point is open to this construction: that at Nelson's request Arundel applied to Bescoby for

his lowest quotation of price on the property in question, that Bescoby gave it and had no intention of doing more than that. It was open to Bescoby, therefore, to accept or reject Good's proposal. He had a reasonable time within which to do this and, whether we accept Mr. Arundel's account of what took place or his own, it cannot be said that, in refusing to accept the proposed purchaser, he delayed unreasonably.

I agree with the Chief Justice that the appeal must be allowed.

RICHARDS, J.A., and HAGGART, J.A., concurred.

*Appeal allowed.*

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## COURT OF APPEAL.

### ROMANISKI V. WOLANCHUK.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*Practice—Sequestration—Judgment for recovery of costs—King's Bench Act, Rule 710, Form No. 147—Contempt—Discretionary order.*

1. A judgment for the recovery of costs is not equivalent to an order to pay money within the meaning of Rule 710 of the King's Bench Act, and the judgment creditor is not entitled under that Rule to a writ of sequestration against the judgment debtor to recover the amount.

*Hulbert v Cathcart*, [1894] 1 Q.B. 244, and *Re Oddy*, [1906] 1 Ch. 93, followed.

2. Rule 710 applies only to cases where a party is ordered to pay money to some person or into court on or before a specified time, but not to an ordinary judgment whereby the plaintiff is adjudged entitled to "recover" money from the defendant.

In other words, it provides an extraordinary remedy where a party has so disobeyed an order or judgment as to be practically in contempt as shown by the Form, No. 147, of a writ of sequestration appended to the Act.

*Hulbert v Cathcart*, [1896] A.C. 470, distinguished.

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3. It is within the discretion of the Judge whether or not he will order a writ of sequestration under the Rule, and, if he exercises that discretion on proper principles, the Court of Appeal should not interfere with it.

*Hulbert v Cathcart*, [1896] A.C. 470, *supra*, followed.

ARGUED: 5th November, 1913.

DECIDED: 24th November, 1913.

**Statement.** THE plaintiff recovered a judgment against the defendant for costs in the sum of \$182.69. It was in the form of an ordinary Common Law judgment that "the plaintiff shall recover against the defendant the costs of the action," etc.

A writ of *fi. fa.* goods was issued and the Sheriff, being unable to recover thereon, stated that he must return to it *nulla bona*.

An affidavit was filed proving the above facts, that the judgment had not been paid, and further, "I have heard the defendant admit that he is the owner of real estate situate in the said Eastern Judicial District and that some portion of the same at least is rental bearing property." There was nothing to show whether this property was exempt from liability for the payment of his debts or not.

Upon this material an application was made by the plaintiff to the Deputy Referee in Chambers for an order under Rule 710 for the issue of a writ of sequestration. The Deputy Referee refused the order and, on appeal to Galt, J., in chambers, the Deputy Referee's decision was affirmed by the following judgment:

GALT, J. This is an appeal from an order made by the Deputy Referee dismissing a motion on behalf of the plaintiff for an order for a writ of sequestration.

Under the judgment pronounced after the trial the Court ordered specific performance of a certain agreement relating to lands and also found that there was due and owing by the plaintiff to the defendant the sum of



\$108.90 in respect of purchase money, and the judgment contains the following provision relating to costs:

"And this Court doth order and adjudge that the plaintiff shall recover against the defendant the costs of this action to be taxed, including the costs of the examinations of the plaintiff and defendant respectively for discovery, after deducting therefrom the said sum of \$108.90."

It appears that the costs in question have been taxed and allowed at \$182.69, so that the total amount due to the plaintiff in respect of costs is a balance of \$73.79. It is for this amount that the plaintiff applies for a writ of sequestration.

The rule under which the plaintiff applies is Rule 710: "If a person who is ordered to pay money neglects to obey the judgment or order according to the exigency thereof, the party prosecuting the same may, at the expiration of the time limited for the performance thereof, apply in Chambers for a writ of sequestration against the defaulting party, and upon proof of due service of a notice of the motion, unless a Judge thinks proper to dispense with such service, and upon proof by affidavit of such other matters, if any, as a Judge requires, a Judge may order a writ of sequestration to issue."

I should be loth to order a writ of sequestration in any case involving only the small amount above-mentioned. But I find that, under the terms of the judgment, the plaintiff is not entitled to the writ whether the amount he claims be large or small. The judgment in question is "that the plaintiff shall recover" the costs, etc.

In *Hulbert v. Cathcart*, [1894] 1 Q.B. 244, the plaintiffs, having recovered judgment against the defendant, obtained from a Master at Chambers an order directing her to pay the amount recovered within ten days from service of the order and, in default of such payment, giving the plaintiffs leave to issue a writ of sequestration against her separate property. It was held that the Master had no jurisdiction to make such an order. In

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giving judgment Wills, J., said: "Assuming, however, that such an order can be made, how is it possible to apply it to a common law action? In such an action the judgment is that the party do recover so much; that is, of course, in any way that he can. How can a master judge have power to fix a time within which he must recover? The judgment is not an order to pay money, and for a master to order that the unsuccessful party must pay the sum recovered within a certain time is to totally alter the nature of the remedy. There is clearly no power to make such an order."

This case was referred to and followed in *Re [1906] 1 Ch. 93*. Cozens-Hardy, L.J., says, in delivering judgment (p. 99):

"There never was a time when in any Court judgment for the recovery of a sum of money in such words could have been enforced by a four day order. In the language of Brett, L.J., in *Drewett v. Edwards*, L.T. 622, the four day order was made in equity to supply a deficiency in the decree, which might have contained what was given in the four day order. The judgment obtained here is not a judgment which could name a day, and so there is no deficiency to supply. The appeal must be dismissed."

The plaintiff appealed.

*N. F. Hagel, K.C.*, for plaintiff, appellant, cited *Bert v. Cathcart*, [1894] 1 Q.B. 244; reversed [1894] A.C. 470, and *Major v. Harness*, [1906] 1 Ch. 93.

*R. B. Graham* for defendant, respondent, cited *A. v. Cleghorn*, 6 O.L.R. 170.

The judgment of the Court was delivered by

HOWELL, C.J.M. It is apparent that, if in matters of this kind there is a discretion, it has been exercised in this case by the Deputy Referee and by a Judge in favour of the plaintiff.

The writ of sequestration is a process handed down to us from the Court of Chancery by Rule 710. In

part a decree operated *in personam* and the only method enforcing it was by process of contempt against the party disobeying it, and amongst the methods were sequestration, attachment and the appointment of receivers. Originally the object of sequestration was to assist the defendant from his property, real and personal, and thus compel him to perform what was ordered. While the sequestrators were in possession they often received moneys, and a practice of the court grew up to apply these moneys by way of payment to the plaintiff to the extent of any moneys which the defendant had by the decree or order been directed to pay to the plaintiff.

The English Judicature Act transferred a large part of this practice to the present Court. Order 42, Rule 3, generally transfers the old Chancery methods of enforcing payments without naming them, and Rule 4 distinctly provides that sequestration may issue to enforce an order to pay money into court while Rule 6 provides for sequestration to enforce the delivery of property.

Order 43, Rule 6, provides that, where any person ordered to pay money into court "or to do any other act within a limited time" neglects to obey the order or judgment, the person prosecuting such order or judgment may without order be entitled "to issue a writ of sequestration against the estate and effects of such disobedient person." This rule further provides that such writ shall have the same effect as the writ in Chancery formerly had, and the proceeds are to be dealt with as formerly in Chancery. Rule 7, under this Order, provides that to enforce the payment of costs there must be an order for the writ.

Under our rules, attachments for contempt and sequestration are considered under one heading of "Attachment and Sequestration." Rules 707 and 708 provide that, if an attachment is issued because of contempt, and the party is in custody, sequestration may issue "against the estate and effects of the disobedient party." Rule 710 is

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the only one under which an order for sequestration, where the defendant is not in custody and where the default is merely the non-payment of money, can be granted, for Rules 707 and 708 do not apply where the default is the non-payment of money. Rule 710 provides that, "if a person who is ordered to pay money neglects to obey the judgment or order," then on default the party prosecuting the order "may, at the expiration of the time limited for the performance thereof," apply for a writ and, upon proof of what is required by a Judge, an order may be granted. There is no provision in this rule stating the force or effect of such writ as is provided by the English rule and perhaps it was considered not necessary because of sections 23, 24 and 25 of the King's Bench Act. I shall assume that a writ of sequestration when issued will be acted upon in the same manner as, and will have the power and effect of, such a writ issued in Chancery in England on the 15th of July, 1870.

I think the true construction to put upon Rule 710 is that it applies only to cases where the party is ordered to pay money to some person or into court on or before a specified time, and that it does not apply to an ordinary judgment where the plaintiff is entitled to "recover" from the defendant; in other words, it is an extraordinary remedy given where the party has so disobeyed the order or judgment as practically to be in contempt. I cannot think that the Legislature intended to allow such a writ to issue against an ordinary judgment debtor, merely because the Sheriff cannot realize upon a *fi. fa.* I do not think that, under such circumstances, the Legislature ever intended that a writ should issue against the impecunious debtor authorizing the Sheriff to enter into possession of and sequester all the debtor's real and personal estate and collect, receive and sequester all rents and profits "and detain and keep the same under sequestration in your hands" until the unfortunate debtor shall



pay "and clear his contempt," and apparently all without any regard to exemptions.

The quotations last set out are taken from Form No. 147, which, by section 96 of the King's Bench Act, is made part of the Act.

If an order is granted under Rule 710, the writ must issue in this form, and I assume that the Sheriff, the sequestrator, would have all the cruel and drastic powers set forth in the writ.

The case of *Hulbert v. Cathcart*, [1894] 1 Q.B. 244, was relied upon by Mr. Justice Galt as an authority to support the order made by him; but Mr. Hagel, on the argument, met this by simply stating that this case was reversed in appeal by a case apparently in the same cause, reported in [1896] A.C. 470. A glance at these two cases shows that the learned counsel was mistaken. The first mentioned case was an application for a writ in a case like this, to enforce payment of a judgment, and was refused, and this case was cited with approval, as quoted by Mr. Justice Galt, as late as 1906.

The case of *Hulbert v. Cathcart*, [1896] A.C. 470, was an application for a writ of sequestration to compel the defendant to pay certain costs which the Court had ordered the defendant to pay to the plaintiff. In giving judgment Lord Herschell uses the following language:

"It is to be observed that the respondent was ordered by a Court of Justice to pay these costs and that these orders of the Court have been treated with contempt," and again, "*Prima facie* the person who has obtained an order of the Court which has been treated with contempt has a right to the process of the Court to secure that its orders shall not be so treated."

The two independent judgments above referred to hold, first, that the writ should not issue to enforce an ordinary judgment, and that it should issue in punishment of contempt.

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Judgment.

HOWELL,  
C.J.M.

1913

gment.

DWELL,  
J.J.M.

I take it that in *Slade v. Hulme*, 18 Ch.D. 653, the motion was not to set aside the writ, but to order payment to the sequestrators, and I assume the writ was issued because of contempt.

The Court of Appeal in the case of *In Re Oddy—Major v. Harness*, [1906] 1 Ch. 93, referred to in the judgment of Mr. Justice Galt, practically decides that, to enforce an ordinary judgment to recover money, a writ of sequestration will not be issued.

In the case of *Knill v. Dumergue*, [1911] 2 Ch. 199, for some reason a writ of sequestration had been issued and the case turns upon the question whether the sequestration can attach a pension. I assume the writ had been issued because of some default in the nature of contempt.

The language used by Mr. Justice Meredith in *Re Asselin*, 6 O.L.R. 170, as to the modesty of the plaintiff's application is eminently applicable to this case.

I would construe Rule 710, explained as it is by the form of the writ, as a process for the punishment of a party who has been ordered to pay money on or before a particular time, the non-performance of which would be a contempt of Court; I would not construe it as another process which a creditor has to enforce the payment of his claim.

It seems to me there is another ground upon which the appeal should be refused. The case of *Hulbert v. Cathcart*, [1896] A.C. 470, shows clearly that the order for the writ is one in the discretion of the Judge, and if he exercised that discretion soundly it is final. I think the learned Judge decided the case on proper principles.

The appeal is dismissed with costs. The costs to be set off against the judgment entered for the plaintiff in this cause.

COURT OF APPEAL.

1913

DAY V. HORTON.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*Executors and administrators—Right of action for damages, survival of—  
Non-suit—Verdict for nominal damages—Appeal—New trial.*

The administrator of the estate of a deceased person cannot recover damages in respect of a chattel belonging to the deceased for its detention or seizure during his lifetime or prior to the issue of the letters of administration, unless there is evidence to show that the chattel was damaged or that the estate of the deceased was depreciated by the seizure or detention in that period.

The administrator, however, is entitled to recover for the estate damages for being deprived of the use and possession of the chattel after the issue of the letters of administration.

Where the evidence shows that such last mentioned damages are only nominal, the Court of Appeal will not set aside a judgment of non-suit in the County Court for the purpose either of ordering a new trial or of entering a verdict for \$1.00 for the plaintiff, but an appeal from such non-suit should be dismissed with costs.

*Cammell v. Clarke*, (1891) 23 S.C.R. 307; *Simonds v. Chesley*, (1891) 20 S.C.R. 174, and *Milligan v. Jamieson*, (1902) 4 O.L.R. 650, followed.

*Per* RICHARDS, J.A. Following *Hiort v. London and N. W. Ry. Co.*, (1879) 4 Ex. D. 188, and *Hogarth v. Jennings*, [1892] 1 Q.B. 907, the judgment of non-suit should be set aside and a verdict for \$1.00 nominal damages entered for the plaintiff without costs of the appeal, and without disturbing the award of costs to the defendant in the Court below.

ARGUED: 21st October, 1913.

DECIDED: 24th November, 1913.

COUNTY Court appeal.

Statement.

The defendant obtained a judgment against one Sidney E. Hoover, and under his instructions the Sheriff, on May 10, 1912, seized an automobile which was claimed by Mrs. Katie E. Day, Hoover's mother, as her own property, and the Sheriff thereupon took out an interpleader order. Mrs. Day died July 28, 1912, and the interpleader action was revived in the name of this plaintiff, her husband, who took out letters of administration.

The interpleader issue directed was decided in the

**1913** claimant's favor, November 28, 1912, and the automobile  
**Statement.** was accordingly returned by the Sheriff on December 5, 1912. This action was brought by the administrator of Mrs. Day on March 17, 1913, to recover damages for the entry on her premises and the seizure thereon of the automobile and for being deprived of the possession and use of the automobile and depreciation thereof, loss of interest on investment and other damage as set forth in the statement of claim. The action was tried before Paterson, Co.J., who entered a nonsuit.

Plaintiff appealed.

*W. S. Morrissey* for plaintiff, appellant, cited *Hollis v. Smith*, 10 East, 293.

*C. H. Locke* for defendant, respondent, cited *Lockier v. Paterson*, 1 Car. & K. 271; *Mason v. Peterborough*, 20 A.R. 683; *Hambly v. Trott*, 1 Cow. 371; *Bishop of Winchester v. Knight*, 1 P.Wms. 406, and *Phillips v. Homfray*, 24 Ch. D. 439.

RICHARDS, J.A. The present defendant obtained an execution against the goods of a son of a woman whose administrator the present plaintiff is. Under this execution he directed the seizure of an automobile. The judgment debtor's mother claimed it as her property and the Sheriff interpleaded. During the course of the interpleader the mother died, and the action was revived in the name of the plaintiff, as her administrator.

The plaintiff succeeded in the interpleader issue, and thereafter the automobile was returned to the plaintiff. He brought this action in the County Court of Winnipeg, claiming damages for the conversion.

There is no evidence to show that the intestate was in any way deprived of the beneficial use of the machine in her lifetime, there being nothing to suggest that she would have used it or gained any benefit from its possession. I do not think, therefore, that any cause of action survived



from her to the administrator for the conversion during that period.

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Judgment.

RICHARDS,  
J.A.

I am of the opinion also that, for the period between her death and the issue of the letters of administration, no cause of action arises.

As to the third period, that between the issue of the letters of administration and the time of the return of the automobile, the plaintiff was, I think, entitled to bring an action.

He gave no evidence whatever to show that he was deprived of any chance to sell the machine, or to otherwise deal with it, for the benefit of the intestate's estate. His damages, therefore, were, at most, nominal; but I think he was entitled to nominal damages.

The learned trial Judge, before whom the case was tried, entered a judgment of nonsuit with costs to the defendant, and the question arises whether he rightly did so.

The cases of *Simonds v. Chesley*, 20 S.C.R. 174, and *Scammell v. Clarke*, 23 S.C.R. 307, hold that, where there has been a verdict for the defendant in a jury trial and the plaintiff on appeal shows that he was entitled to nominal damages, but only to nominal damages, the Court will not subject the defendant to the expense of a new trial to enable the plaintiff to recover these nominal damages, although, strictly speaking, he would be entitled to them.

In *Hiort v. London & N.W. Ry. Co.*, 4 Ex. D. 188, and *Hogarth v. Jennings*, [1892] 1 Q.B. 907, the Appellate Court apparently had jurisdiction to enter the judgments which should have been entered in the Courts below. In those cases judgments had been entered in the lower court for the defendants although the plaintiffs were entitled to nominal damages. The Appellate Court, having, apparently, the power to enter the proper verdict,

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Judgment.

RICHARDS,  
J.A.

in each case entered a verdict for the plaintiff for nominal damages.

I take the result of all the foregoing cases to be this: that, where the plaintiff is entitled to damages, but only to nominal damages, and a judgment has been entered for the defendant, the Appellate Court will enter the proper judgment, if they have power to do so, but that they will not order a new trial, if they have not the power to themselves enter the proper judgment.

Following the above, I think that, in this case, the nonsuit should be set aside, and a verdict for nominal damages, say \$1, entered for the plaintiff.

The question of costs is a more troublesome one. Apparently, although the automobile was the property of the mother and not of the son, there was ground for the execution creditor to believe that it was the son's property. There is no suggestion that the seizure was made in bad faith, or for the purpose of harassing, or for that of forcing a settlement. The plaintiff, although he had the right to bring the present action, must, I think, be held to have brought it vexatiously. I would, therefore, allow no costs of this appeal, and I would not disturb the finding of the trial Judge as to costs; that is to say, although the plaintiff has succeeded, I would leave him liable to pay the costs of the County Court. That was the course taken in the *Hort* case cited above, as I understand it.

The result, I take it, is that the plaintiff will still have to pay those costs, less the sum of \$1 awarded as damages, which is to be set off against them.

CAMERON, J.A. The administrator has a right of action for injury done to the personal estate of the deceased in his (or her) lifetime whereby it has become less beneficial to the administrator, under the statute 4 Edw. III, c. 7, which has received a liberal construction: *Williams on Executors*, 606, 607. There is no

evidence here on which there can be based a claim for damages sustained by the personal estate of Mrs. Day in her lifetime. Nothing is shewn to lead to the belief that the automobile was damaged, or the estate of the deceased depreciated by the seizure, in that period. On the contrary, the motor was carefully preserved. Nor is there any evidence of actual damage to the motor or to the personal estate of Mrs. Day during the period between her decease and the grant of letters of administration.

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Judgment.  
CAMERON,  
J.A.

Whether we regard the plaintiff's action as one for conversion or detention, he may be considered, in either case, entitled to some damages for being deprived of the use and possession of the automobile after the grant of the letters. But such damages, on the evidence, can, at the most, be nominal only, and there was, in reality, before the Court, for determination no question of right or any other question than the question of damages.

The matter before us, therefore, comes down really to a question of costs. A new trial, it is well settled, will not be granted merely to enable a plaintiff to recover nominal damage: *Scammell v. Clarke*, 23 S.C.R. 307; *Simonds v. Chesley*, 20 S.C.R. 174; *Milligan v. Jamieson*, 4 O.L.R. 650. Applying that principle here, where we have power to enter the verdict that should have been entered in the County Court, we ought not to set aside the judgment of nonsuit entered at the trial merely for the purpose of entering a judgment for the plaintiff for a nominal amount.

I think the appeal should be dismissed without costs, but I would not interfere with the disposition of costs made in the Court below.

HOWELL, C.J.M., PERDUE, J.A., and HAGGART, J.A., concurred with Cameron, J.A.

*Appeal dismissed with costs.*

1913

## COURT OF APPEAL.

## RE ALARIE AND FRECHETTE

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*Real Property Act, R.S.M. 1902, c. 148, ss. 83, 113, 114—Mortgage of property under Act—Foreclosure—Jurisdiction of Court of King's Bench to foreclose—Registration in Land Titles Office.*

A mortgage of land under the New System, since it operates as a security only and not as a transfer of the land or of any estate or interest therein: R.P. Act, s. 100, can only be foreclosed by proceedings before the District Registrar as provided for in sections 113 and 114 of the Act, and the Court of King's Bench has no jurisdiction to make a final order or other order of foreclosure of such a mortgage, in the absence at all events of a special agreement between the parties raising equities as to title or for a conveyance of an estate in the land.

*Smith v. National Trust*, (1912) 45 S.C.R. 618, and *National Bank of Australasia v. United Hand in Hand Co.*, (1879) 4 A.C. 391, followed. The District Registrar, therefore, is justified in refusing to register a final order of foreclosure of such a mortgage presented to him for registration.

ARGUED: 9th October, 1913.

DECIDED: 21st October, 1913.

**Statement.** PETITION under the Real Property Act to compel the District Registrar of the District of Winnipeg to register a final order for foreclosure made by the King's Bench in the case of *Alarie v. Frechette*.

*H. P. Blackwood* for Alarie cited *Wayne v. Hanhum*, 9 Ha. 62; *Slade v. Rigg*, 3 Ha. 35; *Smith v. National Trust*, 45 S.C.R. 618; *Capital & Counties Bank v. Rhodes*, [1903] 1 Ch. 631; *Weymouth v. Davis*, [1908] 2 Ch. 169; *Carter v. Wake*, 4 Ch. D. 605; *Belize v. Quilter*, [1897] A.C. 367, and *National Bank v. Hand-in-Hand*, 4 A.C. 391.

*C. P. Wilson, K.C.*, for the District Registrar and the Attorney-General cited *Duffy & Eagleson*, 2nd ed. 254; *National Bank v. Hand-in-Hand*, 4 A.C. 391; *Smith v. National Trust*, 45 S.C.R. 618; *Brickdale & Sheldon*, p. 173, and *Thom's Torrens System*, p. 311.

HOWELL, C.J.M. The simple question in this matter is whether under the Real Property Act, where no title to land is vested in the mortgagee, a simple ordinary final order for foreclosure as under the old system can and does vest in the mortgagee, the estate or interest of the mortgagor. Sections 113 and 114 of the Real Property Act make direct provision for foreclosure by proceedings in the Land Titles Office, and the last mentioned section declares that the order for foreclosure issued by the District Registrar, when registered, shall vest in the mortgagee or his grantee the title of the mortgagor and this is the only title by foreclosure referred to in the Act. The mortgagee has no title to the property. The decree of the Court is "that the defendant Hormidas Frechette do stand absolutely debarred and foreclosed of and from all right, title and equity of redemption in and to the mortgaged premises." This does not pretend to order, or effect, a conveyance or transfer of the title and no case was made out in the pleadings for a conveyance.

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Judgment.  
HOWELL,  
C.J.M.

The Registrar refused to register this decree and this is an appeal from his ruling.

I think that the case of *Smith v. National Trust Co.*, 45 S.C.R. 618, is authority for the proposition that, where the Act lays down a course of procedure by which title is to be got in from the mortgagor, that course must be taken. Of course, if a special agreement was made between the parties raising equities as to title and perhaps agreements as to conveyance, different questions might arise; but this is a simple mortgage under the new system.

I think that, pursuant to the provisions of section 83, the Registrar properly refused to register the decree of foreclosure.

The petition is dismissed.

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Judgment.

PERDUE,  
J.A.

PERDUE, J.A. This is a petition under the Real Property Act to compel the District Registrar of the Winnipeg Land Titles District to register a final order of foreclosure made by the Court of King's Bench in the suit of *Alarie v. Frechette*.

The petitioner, Adonias Alarie, is the mortgagee of certain land in that District by virtue of a mortgage made and registered under the Real Property Act, the land being under the operation of the Act at the time of the making of the mortgage. Default having been made in payment, the above mentioned suit was commenced in the Court of King's Bench on 1st November, 1911, for the foreclosure of the mortgage. The usual proceedings appear to have been taken in that Court, and on 14th May, 1913, a final order of foreclosure was issued purporting to foreclose all right, title and equity of redemption of the mortgagor in the lands mentioned in the mortgage.

This final order of foreclosure was on 20th May, 1913, deposited by the petitioner, the mortgagee, in the Winnipeg Land Titles Office, for the purpose of registration, with a view of applying by way of transmission or otherwise to have the petitioner registered as owner of the land under the Act. The District Registrar refused to register or recognize the order, on the ground that the Court of King's Bench had no jurisdiction to foreclose a mortgage made under the Real Property Act upon land then subject to the operation of the Act.

Sections 113 and 114 set out the procedure to be followed in order to obtain a foreclosure of a mortgage under the Act. This procedure is substantially the same as that contained in the Victoria Act, and in the New South Wales Act. In the case of lands under the Real Property Act a mortgage does not operate as a transfer, but as a security only: Real Property Act, R.S.M. 1902, c. 148, s. 100. The mortgagee, therefore, never has the land

sted in him, so that a bare judgment or order of foreclosure would be inoperative to give him the ownership of the land freed from the mortgagor's equity of redemption. This can only be done by following the procedure provided for that purpose by the Act itself. This is the view that has been taken by the Australian Courts: *Freig v. Watson*, 7 V.L.R. 79; *Long v. Town*, 10 N.S.W. (Eq) 253, 6 W.N. 85. In *National Bank of Australasia v. United Hand-in-Hand Co.*, 4 A.C. 391, it was held that the only way a mortgagee could extinguish the rights of the mortgagor was by foreclosure under the Act or by sale under the Act. This has been followed in a recent case by the Supreme Court of Canada by Mr. Justice Duff, who delivered the judgment of the majority of the Court: *Smith v. National Trust Co.*, 45 S.C.R. 618, 644.

There was a period in this Province between the coming into force of the amendments passed in the year 1906, 5 & 6 Ed. VII, c. 75, ss. 2 and 3, and the repeal of those sections in 1911, by 1 Geo. V, c. 49, s. 7, when the right of sale or foreclosure might have been exercised by any competent Court under the express authority conferred by those amendments. The Act repealing the amendments excepted pending litigation. The repealing Act, however, came into force on 24th March, 1911, and the plaintiff's suit was not commenced until 1st November, 1911. He cannot therefore obtain any benefit under the Act of 1906.

I think the District Registrar acted properly in refusing to register the final order of foreclosure.

The petition should be dismissed.

HAGGART, J.A. Under section 121 of the Real Property Act one Adonias Alarie appealed to a Judge sitting in Chambers against the refusal of the District Registrar to register a certain document called a final order of foreclosure, obtained in a suit on a mortgage covering a certain portion of Lot 29 according to the

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Judgment.  
PERDUE,  
J.A.

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Judgment.  
PRINCE,  
J.A.

Dominion Government Survey of the Rat River S  
ment, which land is more particularly described in  
petition.

The petition sets forth all the steps that were tak  
the suit, which culminated in an order, bearing dat  
14th May, 1913, ordering "that Hormidas Frechet  
stand absolutely debarred and foreclosed of and from  
right, title or equity of redemption of, in and to  
mortgaged premises in the pleadings mentioned."

The petitioner wanted this order registered. The  
trict Registrar refused, and the reason given by him  
refusing to register or recognize the so-called final  
of foreclosure was that the Court of King's Bench h  
jurisdiction to foreclose this mortgage, which was  
under the Real Property Act.

I think the point was well taken by the District I  
trar. The question was very fully discussed by  
Justice Duff in *Smith v. National Trust Co.*, 45 S  
618, and I refer more particularly to his reasons on  
643, 644 and 645. The substance of the judgment  
effect, that the provisions of the Act are the only n  
by which a mortgagee can extinguish the mortga  
title, under the Real Property Act.

I would refer to *Brockdale's Land Transfer Act*,  
*Thom's Canadian Torrens System*, 311; *Duffy & E*  
*son's Transfer of Land Act*, 254; *The National Ba*  
*Australasia v. The United Hand-in-Hand and Ben*  
*Hope Company*, 4 A.C. 391, and *Greig v. Wa*  
7 V.L.R. 79.

The prayer of the petition should be refused.

RICHARDS, J.A., and CAMERON, J.A., concurred.

*Petition dismissed*



1913

## ECKROYD V. RODGERS.

Before GALT, J.

*Vendor and purchaser—Statute of Frauds—Memorandum in writing signed by defendants but not showing name of plaintiff or his agent as purchaser—Ratification—Nominal purchaser.*

1. The Statute of Frauds prevents the enforcement by A, in a suit against B, for specific performance of an agreement signed by B, to sell land to C, in a case where C was not acting as A's agent in procuring the agreement, and did not know of the existence of A at the time.

2. In such a case C could not profess to have been acting on A's behalf and A could not therefore ratify or take advantage of the contract as against B.

*Keighley v. Durant*, [1901] A.C. 240, followed.

3. If the agreement had named A as purchaser she might have been entitled to enforce it although she was not interested in the purchase for herself, but only as trustee for the real purchaser.

ARGUED: 1st, May, 1913.

DECIDED: 13th May, 1913.

In this action the plaintiff sought specific performance of an alleged agreement of sale of certain lands, being a portion of Lot 59 in the Parish of Kildonan, owned by the defendants. An alternative claim for damages was abandoned by the plaintiff at the trial. Statement.

The defendants denied the agreement, pleaded the Statute of Frauds, and contended that the alleged agreement was not completed within the stipulated time.

*R. M. Dennistoun, K.C.*, and *J. R. Higgins* for plaintiff.

*H. W. Whitla, K.C.*, for defendants cited *Keighley, Maxted & Co. v. Durant*, [1901] A.C. 240; *Moore v. Roper*, 35 S.C.R. 533; *Maber v. Penskalski*, 15 M.R. 236; *Grant v. Reid*, 16 M.R. 527; *White v. Tomalin*, 19 O.R. 513; *Calgary Realty Co. v. Reid*, 19 W.L.R. 649; *Vanderlip v. Peterson*, 16 M.R. 341; *Hubert v. Treherne*, 3 M. & G. 743; *Rathom v. Calwell*, 16 B.C.R. 201, and *Skelton v. Cole*, 1 De G. & J. 587.

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Judgment.  
GALT,  
J.

GALT, J. It appears by the evidence that the defendants, on April 29, 1912, had purchased the land in question, and that they had agreed amongst themselves that the property should be sold for such price as the parties (defendants) should from time to time determine upon; and that, should any disagreement arise in relation to the sale or other dealings whatsoever in the said property, the mutual decision of any two of the said parties should be binding on the three parties; and the above-mentioned parties covenanted and agreed each with the others to carry out the wishes of the majority and to execute all documents and conveyances as should be necessary for carrying out of said agreement.

On or about May 3, 1912, one F. A. Clark, a member of the real estate firm of Clark & Munro, had an interview with the defendant Whitlock, during which Whitlock told him that the property in question was for sale. Thereupon Clark called on one Nassau Preston, a real estate agent, and gave him particulars showing a description of the lands, containing 16.82 acres at \$100 per acre. Preston then communicated with John McRae, with whom he had had previous real estate dealings. McRae expressed his willingness to purchase the land and stated to Preston that, for business reasons, he desired to wish his name to appear in the transaction. Preston stated that his sister, Emma Ecroyd (the present plaintiff), would probably allow her name to be used, to which McRae assented. Preston communicated with Emma Ecroyd, residing at Gladstone, by telephone, and obtained her consent. He merely mentioned to her that he desired the use of her name in a purchase of some land, but did not give her any particulars either of the land or of the real parties to the transaction. On May 4th Preston informed Clark that he had some one who would take the property, but did not mention Mrs. Ecroyd's name.

Clark says he understood that McRae was to purchase

property on behalf of himself and two or three other persons. Thereupon Clark went to the defendant Rodgers and told him that he did not know who was buying, but Clark gave Rodgers a cheque for \$500 by way of a deposit on the sale, and took from him a receipt expressed as follows:

"May 4th, 1912.

"Received from Messrs. Clark & Munro a cheque for \$500, being a deposit to purchase the following property: lying in the Parish of Kildonan, in the Province of Manitoba, according to the Dominion Government Survey of 1906, and being all that portion of Lot 59 of the said Parish, bounded as follows: On the west by the Easterly limit of the Main Highway or Bird's Hill Road as surveyed by R. C. McPhillips, M.L.S., in 1906; on the north by a line drawn south of and parallel with the northern limit of the said Lot, and distant therefrom 264 feet on the course of the said easterly limit of the said Bird's Hill Road; on the east by a line drawn east of and parallel with the said easterly limit of the Bird's Hill Road, and distant therefrom 2,640 feet, on the course of the said northern limit of the said Lot, and on the south by the southerly limit of the said Lot, containing 82 2/100 acres more or less, at and for the price and sum of \$1,200 per acre, on terms of one-quarter cash, and the balance in three equal consecutive instalments. Each instalment to become due and payable on the following dates: 26th of March, 1913, 26th of March, 1914, 26th of March, 1915, together with interest at 6 per cent. The purchasers are to have all the privileges that are conferred by the agreement in which the vendors purchased the property, and are to be given 10 days from the date of the receipt to close the sale, subject to forfeiture of the deposit, and subject to the usual commission to agents.

(Sgd.) "W. P. Rodgers.

"Accepted as above.

(Sgd.) "F. A. Clark."

The receipt appears to have been drawn in duplicate. The one filed in court as Exhibit 3 contains the signature of Rodgers only, but the evidence satisfies me that there is a duplicate receipt signed by both Rodgers and

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Judgment.  
GALT,  
J.

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GALT,  
J.

Whitlock. Clark then handed the receipt to Pre and on May 6th, 1912, McRae gave Clark a cheque \$500 thereby reimbursing him the amount paid deposit. Clark says that the first he heard of Emma Ecroyd was a day or two after receiving repayment of \$500, and that he then took the name to Rodgers' to have it filled into an agreement of sale which Rodgers was preparing.

The proposed agreement of sale was prepared under Rodgers' instructions in his own office and was sent to Egerton W. Marlatt (of Hudson, Ormond & Marlatt solicitors) for revision on behalf of the purchaser. During the currency of the ten days time limit mentioned in the receipt, Mr. Marlatt had examined the title and was prepared to close with the defendants; but the balance of the first cash payment had not been given to Rodgers. Rodgers says that he did not hear of Emma Ecroyd the intending purchaser until three or four days after the agreement of sale was drawn up, and her name was inserted in the draft agreement.

With a view to showing waiver of the time limit by the defendants, the following answers in the examination for discovery of Whitlock were put in evidence:

"59. Q. You were urging Mr. Clark to hurry and get it closed? A. Certainly.

"65. Q. When was the last occasion on which you asked him that question? A. I may have asked him on the 16th of May.

"39. Q. You had an agent? A. Yes.

"40. Q. Who was the agent? A. Mr. W. Rodgers.

"41. Q. Mr. Rodgers was looking after it? A.

"42. Q. I suppose what Mr. Rodgers did in connection with preparing those agreements was done under your authority then? A. I cannot say that—he has to prepare them and submit them to me to sign—I have got to sign everything he has prepared.

"43. Q. And they were never submitted to you for signature prior to the 18th? A. No.

"44. Q. So that you could not very well have signed them prior to the 18th? A. I was at Mr. Rodgers' office on the 18th, prepared to sign them."

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Judgment.  
GALT,  
J.

On May 20th McRae gave a cheque to Preston for \$4,546 to complete the first cash payment. Preston was in partnership with one Charles Smith, who did business as a real estate agent under the name of Charles Smith & Co. Preston endorsed McRae's cheque to Charles Smith & Co., and the latter gave a cheque to Hudson, Ormond & Marlatt, on May 20th, for \$3,536.80, thereby deducting \$1,000 by way of commission, to be distributed between Clark & Munro, John McRae, Preston and Charles Smith.

As soon as Marlatt received the cheque for \$3,536.80, he states that he rang up Rodgers, told him he had the money to complete the payment, but as it was after banking hours he would call around with a marked cheque early the following morning, and that Rodgers replied, "That will be all right."

Rodgers states that on that day, May 20th, he had determined to call the deal off, and that he drew up a cheque for \$500 (the deposit which had been paid on the sale), and handed it to Clark. The accounts given by Rodgers in regard to what transpired on May 20th in his examination for discovery and at the trial are unsatisfactory and contradictory. I should gather from the evidence that, after the conversation which he had with Mr. Marlatt by telephone, Rodgers determined to call the deal off.

Next morning Marlatt called twice at Rodgers' office with a marked cheque, but could not find him. On the same day, May 21st, Marlatt wrote to Rodgers stating that he had just been notified that Rodgers had returned the deposit, and expressing his surprise, especially in view of the arrangement he had made the evening before with a view to closing up the purchase on the morning of the 21st. The letter also notified Rodgers that the sale

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Judgment.  
GATT,  
J.

must be put through and that Hudson, Ormond & Marlatt were prepared to pay the balance of the cash payment in exchange for a copy of the agreement executed by the vendors. No reply was received to this letter and this action was thereupon commenced.

The mode in which the plaintiff has become a party to these proceedings strikes me as being somewhat remarkable. She never had any intention of purchasing the land in question; she did not know who were the owners of it, nor who the real purchasers were to be, and she had in fact no interest whatever in the transaction. She was nothing more nor less than a "dummy" utilized by John McRae, the real purchaser, on behalf of himself and those with whom he intended to act in concert. I am assured by the learned counsel for the plaintiff that this is a very common mode of carrying out real estate transactions in this Province, especially where syndicates are concerned, and that there is usually a trust agreement entered into between the parties concerned.

If the agreement of sale in the present case, which was prepared, but not executed by anybody, had been completed, plaintiff would have obligated herself to the extent of \$20,184 in favor of the defendants and left herself open to expensive legal proceedings in case default were made in paying any of the instalments.

In answer to an inquiry I put to one of the witnesses as to the object of such machinery in real estate transactions, the witness said it would have the effect of relieving the parties interested from liability in case of default. So far as the evidence goes, no indemnity of any kind appears to have been demanded or received by the plaintiff for placing herself in such a position. Unless she could claim indemnity under the principle applied in *Bank of England v. Cutler*, [1908] 2 K.B. 208, she would seem to be without remedy.

However, that is not the point in issue here. Even



"dummies" may have rights, and the question is whether the present plaintiff is entitled to the relief she seeks.

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Apart from the question of the Statute of Frauds, which I will deal with presently, I see no reason for refusing the relief which the plaintiff claims. Assuming an agreement by the defendants to sell the lands to the plaintiff, I do not think she is debarred by the expiration of the ten days from May 4th, 1912, within which time the sale was to be closed; for after the expiration of that period, on May 16th and 18th, the defendant Whitlock clearly shows a continuation of the negotiations. As to the communication on May 20th between Marlatt and Rodgers, I would accept the testimony of the former in preference to that of the latter, and would find that Rodgers acquiesced. Under such circumstances, the renunciation of the contract was wrongful, and in my opinion the plaintiff was relieved of the necessity of tendering the balance of the cash payment.

The question still remains, was there any agreement in writing between the plaintiff and the defendants sufficient to comply with the Statute of Frauds?

On May 4, 1912, the defendants Rodgers and Whitlock signed the receipt for \$500 handed to them by their own agent Clark, and I think their signatures bound the defendant Sumner also. At that date both Clark and Rodgers knew that John McRae was the party really interested in purchasing the property, either for himself or for himself and others. Neither Clark nor any of the defendants had heard of the present plaintiff Emma Ecroyd. Clark heard of her for the first time a day or two after May 6th, and subsequently her name was communicated to Rodgers.

Under the above circumstances counsel for the plaintiff contends that there was a contract of sale entered into between the parties on May 4, 1912, and that the receipt signed by two of the defendants was a sufficient memor-

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andum in writing. It is contended that the plaintiff's consent to let her name be used as purchaser was obtained by Preston on May 3rd, and that Clark was in truth acting as agent for both vendor and purchaser when, on May 4th, he paid the \$500 deposit to Rodgers, and that consequently Preston's knowledge of Emma Ecroyd's position should be imputed to both Clark and Rodgers.

In my opinion Clark was acting throughout as agent for the defendants and not for the plaintiff at all. If Clark cannot be regarded as an agent for the plaintiff, it is clear that she can have no interest in the agreement which was made. But, even assuming that Clark was acting as agent for the purchaser (whoever he might be) and that Preston's knowledge should be imputed to both Clark and Rodgers, I think the same result must follow. They would in such case be aware that John McRae (acting either for himself or for himself and others) was the real purchaser and that the plaintiff was a mere dummy. McRae was the principal in this transaction, and was merely acting under the name of the plaintiff. As a matter of fact both Clark and Rodgers understood that John McRae was the real purchaser, and if he had been the plaintiff in this action different considerations might well arise.

When a purchaser has completed his purchase he may no doubt direct the vendor to convey the land to a nominee not bound by the contract; but this is a very different thing from the right claimed by the plaintiff to make herself a party to an executory contract in which she was in no way interested. The doctrine of ratification cannot be resorted to in such a case, either for the benefit of the original contracting parties or of the third party: See *Keighley Maxsted & Co. v. Durant*, [1901] A.C. 240.

The only written contract which I am at liberty to refer to, as regards the Statute of Frauds, is the receipt



given by Rodgers and Whitlock to Clark on May 4th. That document professes at most to treat Clark & Munro as purchasers. At that date Clark was entirely without authority from the plaintiff, and indeed without any knowledge of her existence, so that he could not in any way profess to be acting on her behalf. Under the *Keighley Maxsted* case, above referred to, the plaintiff could not thereafter ratify or take advantage of the contract as against the defendants.

The action must be dismissed with costs.

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J.

### COURT OF APPEAL.

#### PULFORD V. LOYAL ORDER OF MOOSE.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*Landlord and tenant—Agreement for lease—Statute of Frauds—Contract of corporation—Seal of corporation—Delegation of authority to act for corporation—Appointment of agent of corporation—Estoppel—Ratification.*

Action for damages for breach of agreement to take a lease.

The defendant lodge was organized under The Charitable Associations Act, R.S.M. 1902, c. 18. By resolution passed at a regular meeting of the lodge, the house committee, which had been previously appointed, was given power to rent or lease suitable club rooms. One Gibbs, who signed the letter upon which this action was based, though not named as a member of the house committee, was "Vice-dictator," or second chief officer of the lodge, and acted as chief officer in the absence of the "Dictator," and as a member of the house committee. He was active in endeavoring to secure suitable premises, acted as chairman of the committee in the absence of the elected chairman, and received the thanks of the lodge "for his untiring efforts on behalf of the house committee." After negotiations with the plaintiff for a lease of the premises in question, during which a verbal understanding was reached with Gibbs and four other members of the committee, Gibbs procured from the secretary of the lodge his firm's cheque for \$100.00 to be paid to the plaintiff, and the next day Gibbs, accompanied by the four, handed the cheque and a letter signed "Loyal Order of Moose, per W. G. Gibbs," to the plaintiff's rental agent, one Groves, and addressed to Groves, offering

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on behalf of the lodge to take a lease of the premises for two years to commence when the improvements agreed on should be completed and asking for a written reply by noon the next day. The offer was duly accepted by the plaintiff, who received the \$100 and went to considerable expense in fitting up the premises to suit the defendants. He also sent the keys to the defendants, who retained them for three months. The secretary was afterwards reimbursed the \$100 out of the funds of the lodge, which payment was fully authorized. The defendants never took possession of the premises and repudiated the agreement for a lease at the time of returning the keys.

The Court found it clear upon the evidence that the lodge, acting by resolution, had delegated its powers with respect to renting club rooms to the house committee and that the committee had practically delegated their powers to Gibbs.

Nearly a month after the agreement, the defendants' solicitor wrote to the plaintiff a letter distinctly referring to the lease and complaining that, by reason of delay in completing the alterations agreed on, the lodge had lost an opportunity of sub-letting a portion of the premises.

*Held*, (1) That Gibbs was authorized to sign the written offer on behalf of the defendants, and that it was not necessary that his appointment should have been under seal of the lodge, as the plaintiff dealt with him in good faith and without notice of any informality in his appointment.

*Faviell v. Eastern Counties Ry. Co.*, (1848) 2 Ex. 344; *Mahony v. East Holyford*, (1875) L.R. 7 H.L. 869; *Wilson v. West Hartlepool*, (1864) 34 Beav. 187, and *Muldowan v. German-Canadian Land Co.*, (1909) 19 M.R. 667, followed.

(2) In any event there were acts of acquiescence on the part of the lodge sufficient to ratify and confirm the contract and to estop the defendants from denying it.

*Hoare v. Mayor of Lewisham*, (1901) 85 L.T. 282; *Conway Bridge Commissioners v. Jones*, (1910) 102 L.T. 92. and *Reuter v. Electric Telegraph Co.*, (1856) 6 E. & B. 341, followed.

(3) Parol evidence was admissible to show that Groves was the plaintiff's agent, and the Statute of Frauds does not prevent the enforcement by a principal of a contract in writing which his agent has made for him in the agent's own name.

*Commins v. Scott*, (1875) L.R. 20 Eq. 11; *Morris v. Wilson*, (1859) 5 Jur. N.S. 168, and *Filby v. Hounsell*, [1896] 2 Ch. 737, followed.

ARGUED: 24th October, 1913.

DECIDED: 7th November, 1913.

#### Statement

THE plaintiff, A. H. Pulford, claimed that on June 11, 1912, the defendants agreed to lease the top flat of the Pulford Block on Portage Avenue for two years at a rent of \$100 per month, the rent to begin from the time

the premises should be ready for occupation after certain repairs had been made.

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Defendants entered into possession on July 9th, and paid the first month's rent, but subsequently they repudiated the agreement. The plaintiff therefore suffered loss and damage for which he claimed \$2,300.

The defence set up was that the plaintiff did not carry out the terms of the agreement, if any were made; that it was not made under the corporate seal of the defendants and was therefore not binding on them, and was beyond the powers and authority of the defendants to enter into. Further, that, if the agreement was made, it was a term of it that defendants should be put into possession on July 1, 1912, which plaintiff did not do, and defendants therefore claimed damage for their loss.

The case was heard before Macdonald, J., who held that the plaintiff could not recover and he granted a non-suit.

Plaintiff appealed.

*W. A. T. Sweatman* and *A. G. Kemp* for plaintiff, appellant, cited *Dickinson v. Barrow*, [1904] 2 Ch. 339; *Hoare v. Lewisham*, 85 L.T. 281; *Manning v. Winnipeg*, 21 M.R. 203; *Nevill v. Ross*, 22 U.C.C.P. 487; *Conway v. Jones*, 102 L.T. 92, and *Faviell v. Eastern Counties Railway Co.*, 2 Ex. 343.

*H. P. Blackwood* for defendants, respondents, cited *Eliason v. Henshaw*, 4 Wheat, (U.S.) 225.

PERDUE, J.A. The defendants are incorporated by Letters Patent issued by the Government of the Province of Manitoba under the provisions of the Charitable Associations Act, R.S.M. 1902, c. 18. The purposes of the members in seeking incorporation were, as stated in the Letters Patent, (a) for mutual protection by means of contributions, subscriptions, donations or otherwise against casualties caused by disease, accident or death

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with a view of helping the afflicted or the widows and orphans of deceased members; (b) for any benevolent or provident purpose not connected with trade or business."

These are two of the purposes set out in section 2 of the Act for which such associations or persons may be incorporated.

The letters patent authorize the corporation to hold land for its purposes, provided that the annual value thereof shall not exceed \$5,000.

A booklet was put in evidence which was called the Constitution of the defendant association. This purports to contain the constitution and laws of the "Supreme Lodge of the World, Loyal Order of Moose." This is apparently a foreign association all the officers of which reside in the United States. The booklet contains a provision for the formation of subordinate lodges and a number of sections headed, "General Laws for Government of Subordinate Lodges." Although it is by no means clear, I take it that the defendants have adopted as their by-laws the provisions appearing under this last heading in so far as they are authorized so to do by the laws of this Province. It was so assumed upon the argument of the case. No point was raised as to the legality of these by-laws, if such they can be called, or whether the defendants have sufficiently complied with the Act in electing directors and appointing officers.

The defendants, on 5th June, 1912, passed a resolution in favour of opening club rooms. The secretary was instructed to write to the Supreme Lodge for authority so to do. The house committee, which had previously been appointed by resolution, "was vested with full power to rent or lease suitable club rooms." Whether authority from the Supreme Lodge was necessary or not, we can at all events infer that it was granted, because club rooms were afterwards leased, opened and used as such by the Lodge. From the evidence given in the case I have no

hesitation in finding that the house committee, on behalf of the Lodge, agreed to lease the premises in question from the plaintiff. This took place on 11th June, 1912. On that date an offer in writing to take the premises for two years on certain terms therein set out was drawn up and sent to Groves, the plaintiff's agent. This offer was signed "Loyal Order of Moose, per W. G. Gibbs." Gibbs held the office of "vice-dictator" in the Lodge, a position which, I take it, corresponds to that of vice-president. He had apparently assisted the house committee very much in the business of procuring club rooms, because we find a vote of thanks to him included in the resolution of 5th June, "for his untiring efforts on behalf of the house committee." The plaintiff's agent accepted the offer signed by Gibbs and a cheque for \$100 was then handed to the agent on behalf of the defendants. This was a cheque of the firm of which Clark, the secretary of the Lodge, was a member. This advance made by Clark was repaid to him at once out of the moneys of the defendants. A warrant was made out and signed by two of the trustees of the Lodge authorizing the payment and designating it as "rent of Club rooms." The payment of \$100 appears as an entry in the cash book under date of 12th June, where it is referred to as rent. The cheque was signed by Newton, who was at the time the "dictator" of the Lodge, an office which I infer is equivalent to that of president, the office of president being provided for by the Charitable Associations Act, but no mention being made in it of such an office as dictator. The constitution, or by-laws as we may assume them to be, shows that the dictator exercises all the powers that would ordinarily be exercised by a president. Newton knew, when he signed the cheque, the purpose for which the money had been paid. The treasurer paid the \$100 to Clark.

Under the Charitable Associations Act, the affairs of the corporation are to be managed by a board of directors

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or trustees appointed as indicated in the Act. I think we must assume that the trustees mentioned in the evidence and referred to in the "constitution" were the directors or trustees contemplated by the Act.

A letter was written on 3rd July to the plaintiff by the defendants' solicitor distinctly referring to the lease made by the plaintiff to the defendants and complaining that, by reason of delay in completing certain alterations, the Lodge had lost an opportunity of sub-letting a portion of the premises.

On 9th July the plaintiff notified Gibbs that the premises were ready and at the same time caused the keys of the premises to be handed to him. There was no denial of the authority to make the lease by the defendants until 9th October, and the keys of the premises were not until then returned to the plaintiff.

I think that the facts I have referred to establish that Gibbs was authorized to sign the written offer on behalf of defendants, or that, at all events, his action in so doing was ratified afterwards by the defendants.

The leasing of premises was within the scope of the defendants' powers. The plaintiff acted upon the contract of lease and made considerable alterations in the premises at the request of the members of the house committee who arranged the lease. A payment of \$100 which was put through in due form by the directors and officers of the Lodge, and passed into its books, was made to the plaintiff on account of rent. This brings the case exactly within the principles referred to in *Reuter v. Electric Telegraph Co.*, 6 E. & B. 341, and *Smith v. The Hull Glass Co.*, 8 C.B. 668, and 11 C.B. 897.

A further objection taken by the defendants was that the writing was addressed to Groves, the plaintiff's agent, and that the plaintiff's name did not appear either in the writing or in the acceptance. But, in order to satisfy

the Statute of Frauds, it is immaterial that the parties named in the memorandum are in fact agents. Parol evidence is admissible to prove who are the principals. A person may enforce a contract which his agent has made for him in the agent's own name. These principles are stated in *Commings v. Scott*, L.R. 20 Eq. 15; *Morris v. Wilson*, 5 Jur. N.S. 168; *Filby v. Hounsell*, [1896] 2 Ch. 737.

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There was no justification for the defendant's breach of the contract to take a lease of the premises.

I think the appeal should be allowed and that a judgment should be entered for the plaintiff. The damages have been assessed by this Court at \$900 over and above the money already paid to the plaintiff. The defendants should pay the costs of this appeal and also the costs in the Court of King's Bench down to and including the trial.

CAMERON, J.A. This is an action brought by the plaintiff on an agreement for a lease of certain premises, the property of the plaintiff, made by the defendants, for two years at a monthly rental of \$100. The agreement is dated June 11, 1912.

The dispute narrows down to the question whether the document on which the plaintiff bases his claim satisfies the requirements of the Statute of Frauds.

The defendant lodge was organized under the Charitable Associations Act, R.S.M. 1902, c. 18. The letters patent constituting the defendant lodge a body corporate and politic under the Act are dated October 31, 1911. The minutes of the lodge show the appointment of a house committee, January 22, 1912. This committee was given power to rent or lease suitable club rooms by resolution passed at a regular meeting June 5, 1912.

The plaintiff, according to his evidence, met Mr. Gibbs, vice-dictator of the lodge, and certain other mem-

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bers of the house committee on June 12, 1912, when the terms of the lease of the premises in question were discussed and agreed to. There was another meeting the next day when Gibbs handed over to Groves the letter dated June 11th, which is the basis of this action. In the letter was enclosed a cheque for \$100. Groves to whom the letter is addressed is rental agent for the Rogers Realty Co., rental agents for the plaintiff.

The following is a copy of the letter referred to:

"Re top flat Pulford Block, Donald Street.

"I beg to submit the sum of one hundred dollars (\$100) rent per month for above flat taking a two years' lease. Owners to repair and make place comfortable and attractive and furnish heat and water.

"We guarantee proper usage of flat and will keep same in repair. Rent to start from day flat can be used by Loyal Order of Moose.

"The space to include from passage to windows (back) and from north brick wall to wooden partition. Stairs to be covered over as suggested by Mr. Newton and the writer on June 5th.

"Kindly give me a written reply by 12 o'clock noon. Wednesday, June 12th.

"Or submit best price.

"Yours truly,

"Loyal Order of Moose,  
"per W. G. Gibbs."

This offer was duly accepted by Pulford, who received the \$100 and went to considerable expense in fitting up the premises to meet the needs of the defendants. The plaintiff also sent the keys to the defendants, who retained them until the following October. The cheque for \$100, made by Bannerman Clark & Co., was afterwards reimbursed out of the lodge's funds. There is no question that this payment was duly authorized.

Parol evidence is clearly admissible to show that Groves was agent for the plaintiff and there is no doubt as to the fact on the evidence. As the name of the agent



appears, the identity of the plaintiff is sufficiently disclosed by the memorandum. This is the law as it appears to be clearly laid down: *Commins v. Scott*, L.R. 20 Eq. 16, per Sir George Jessel; *Filby v. Hounsell*, [1896] 2 Ch.D. 737; *Standard v. Nicholson*, 24 O.L.R. 46.

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The house committee of the defendants was appointed January 22, 1912, and was, by resolution passed June 5, 1912, vested with full powers to rent or lease club rooms. Gibbs, who signed the letter of June 11th, is not named as a member of the house committee. He was, however, vice-dictator, or second chief officer of the lodge, acting as chief officer in the absence of the dictator, and he acted as a member of the house committee. This appears in the evidence of the members of the committee. Newcombe, past dictator and chairman of the house committee, says he (Gibbs) "had some power to a certain extent," but he holds he had no authority to sign. Newcombe was present at the meeting when Gibbs handed over the cheque for \$100. Fletcher says that it was at Gibbs' request that he went up to see the premises in question. Gibbs, he says, did quite a lot of work in endeavoring to procure premises and acted as Chairman of the house committee in Newcombe's absence. It was apparently on Fletcher's motion that a vote of thanks to Gibbs "for his untiring efforts on behalf of the house committee" was put and carried at the meeting of the lodge, June 5, 1912. McIntosh, a trustee but not a member of the house committee, inspected the premises at Gibbs' request, and at p. 156 he speaks of Gibbs as one of the members of the house committee, who had been very active in the negotiations for club rooms. At p. 179 the trial Judge asked McIntosh whether Gibbs was a member of the house committee, and the answer is "Mr. Gibbs was acting on the house committee." Clark, the secretary of the lodge, testifies that he gave Gibbs' his firm's cheque at Gibbs' request in order to "make a de-

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posit on some premises." This advance was repaid out of the lodge funds pursuant to a warrant signed by the trustees, McIntosh and McFarlane. Clark says he is not certain, but he presumes he told "these people" that he had given Gibbs a hundred dollars to be paid for the first month's rent of these premises. He got the money from the treasurer.

According to the plaintiff's evidence the terms were agreed upon at the meeting on June 12th, when Gibbs, Newton, Newcombe and McIntosh were present.

Those present acquiesced in the terms and in the statement that a cheque would be brought as deposit. The next day Newton, Newcombe, McIntosh, Gibbs and Fletcher met the plaintiff and the letter of June 12th and the \$100 were given to Mr. Groves on the plaintiff's behalf. Gibbs handed Groves this letter in the presence of the others.

Gibbs was present during the trial, but was not called to give evidence by the defence, though he was the man above all those involved who was in a position to shed light on the transaction. He was clearly a member of the house committee, sometimes acting as its chairman and taking the leadership in the negotiations by virtue of his position as vice-dictator and otherwise.

On the whole it is clear that the lodge, acting by resolution, delegated its powers with respect to renting club rooms to the house committee. I think it also reasonably clear that the members of the house committee practically delegated their powers to Gibbs, who, according to Newcombe, "had been working harder than all the other members of the house committee put together." Having in view the plaintiff's evidence, particularly, and the evidence generally of the members of the lodge, I think I must reach the conclusion that the members of the house committee clothed Gibbs with authority to write and sign the letter of June 12th, and to hand over to the plaintiff

the \$100 therein enclosed. They were with Gibbs when he handed this letter to Groves. The theory that Gibbs was acting without authority from or consultation with the members of the committee, in the absence of a clear and unequivocal explanation of the facts from him, must, in my judgment, be rejected.

It is objected that the appointment of Gibbs should have been under the seal of the defendant lodge and, there being no such appointment under seal, he could not bind the lodge as its agent. The general rule in England is that the appointment of an agent by a corporation must be under its common seal. The rule, with its exceptions, is stated in *Bowstead on Agency*, p. 43. We discussed this branch of the law as concerning municipal corporations in this Province in *Manning v. City of Winnipeg*, 21 M.R. 203.

Where, however, a corporation holds out or permits a person to appear as its agent, it is bound by his acts as such, with respect to persons dealing with him in good faith, and without notice of any informality, though he has not been formally appointed: *Bowstead*, p. 45; *Faviell v. Eastern Counties Ry. Co.*, 2 Ex. 344. See also *Bowstead* at p. 292, and the cases cited in the following pages. I refer particularly to *Mahoney v. East Holyford*, L.R. 7 H.L. 869; *Re County Life Ass. Co.*, L.R. 5 Ch. 288; *Wilson v. West Hartlepool*, 34 Beav. 187. I had a similar question before me in *Muldowan v. German Canadian Land Co.*, 19 M.R. 667, arising out of our Joint Stock Companies Act.

Inasmuch as in this case the plaintiff was led to believe by the lodge through the acts, words and conduct of its house committee, and the members of that committee, and of its officers, that Gibbs was authorized to sign and send the letter of June 11th, and, acting on that belief, entered into the agreement proposed, and in good faith incurred considerable expense in fitting up the premises, it would appear to me that the case comes fairly within the law as

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stated in *Halsbury*, I., 156. It is not denied that Gibbs had authority to a certain extent and, if he exceeded it to the prejudice of the plaintiff who acted throughout in good faith, then the lodge, having made that excess of authority possible, is estopped from denying Gibbs' ostensible agency.

In any event the payment of the \$100 to the plaintiff out of the funds of the lodge, and the various acts of the defendants' officers in connection with the transaction, constitute acts of acquiescence on the part of the lodge sufficient, in my opinion, to ratify and confirm the contract. Amongst those acts I refer to the acceptance and retention for a long period of the keys, the wording of the solicitors' letter of July 3rd, which admits a contract, the acceptance of the receipt for the \$100, the issue of the warrant for the payment of that amount by the trustees in conformity with the rules of the lodge, and the payment made by the treasurer thereon, the entry of the payment in the lodge's cash book, the offer made to the plaintiff by McIntosh of \$100 "to allow the matter to drop," and the acts and conduct throughout of Gibbs, vice-dictator of the lodge, and the most active member of the house committee. These circumstances appear to me clearly referable to the contract and sufficient to bring the case within *Hoare v. Mayor of Lewisham*, 85 L.T. 282, and *Conway v. Jones*, 102 L.T. 92. I refer also to *Reuter v. Electric Telegraph Co.*, 6 E. & B. 341.

At the trial the learned trial Judge took the view that the plaintiff had failed to establish a cause of action as set forth in the pleadings. With deference, I am unable to concur in this view. I think the judgment of non-suit entered at the trial should be set aside and that judgment for the plaintiff should be entered for \$900 damages. The appeal is therefore allowed with costs to the plaintiff of the appeal and of the action.

HOWELL, C.J.M., RICHARDS, J.A., and HAGGART, J.A., concurred.

*Appeal allowed.*

## COURT OF APPEAL.

## McINTOSH V. WILSON.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*Landlord and tenant—Liability to repair—Damages caused by defect in demised premises—Lease of unfurnished premises.*

In the absence of any special provision in a lease of an unfurnished house or suite in an apartment block, there is no liability on the part of the landlord to put or keep the demised premises in repair, or for any accident which may happen in consequence of the premises being in a dangerous and unsafe state, unless there has been fraud or misrepresentation on his part.

*Robbins v. Jones*, (1863) 15 C.B.N.S. 221; *Lane v. Cox*, [1897] 1 Q.B. 415, and *Cavalier v. Pope*, [1906] A.C. 428, followed.

A radiator in one of the suites of an apartment block, heated by a general steam plant in the basement, is a part of the demised premises on a lease of that suite, and the tenant cannot recover against his landlord damages caused by the radiator, which had been insecurely fastened to the ceiling of the room, breaking away by its own weight and falling to the floor, especially when the lease executed by the tenant contained a special provision that the landlord should not be liable for any injury or damage arising from any defects in, or accident to, any of the heating plant or service in the said suite and premises *Miller v. Hancock*, [1893] 2 Q.B. 177, distinguished.

ARGUED: 28th October, 1913.

DECIDED: 24th November, 1913.

ACTION by a tenant against his landlord in respect of damages caused by the fall of a radiator, part of the fittings of the steam heating on the demised premises. Statement.

The case was tried before Paterson, Co.J., who entered a verdict for the plaintiff for \$103.

The defendant appealed.

*J. Auld* for defendant, appellant, cited *Robbins v. Jones*, 15 C.B.N.S. 220; *Hart v. Windsor*, 12 M. & W. 68; *Broggi v. Robins*, 15 T.L.R. 224; *Brown v. Toronto Gen. Hospital*, 23 O.R. 599; *Cavalier v. Pope*, [1906] A.C. 428; *Tredway v. Machin*, 91 L.T. 310; *Lane v. Cox*, [1897] 1 Q.B. 415; *Chappell v. Gregory*, 34 Beav. 250; *Anderson v. Oppenheimer*, 5 Q.B.D. 602; *Blake v.*

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*Woolfe*, [1898] 2 Q.B. 426; *Rogers v. Sorell*, 14 M.R. 450, and *Ryall v. Kidwell*, 82 L.J.K.B. 877.

*J. C. Collinson* for plaintiff, respondent, cited *Finney v. Steele*, 12 Am. & Eng. Ann. Cas. 510; *Steeffel v. Rothschild*, 1 Am. & Eng. Ann. Cas. 676; *Cornfoot v. Fowke*, 6 M. & W. 358; *Miller v. Hancock*, [1893] 2 Q.B. 177; *Smith v. London & St. Katherine Docks Co.*, L.R. 3 C.P. 326; *Iowa v. Herschel*, 24 Am. & Eng. Ann. Cas. 207; *Huggett v. Miers*, [1908] 2 K.B. 278, and *Snodgrass v. Newman*, Q.R. 10 S.C. 433.

PERDUE, J.A. This is an action by a tenant against his landlord in respect of damages caused by the fall of a radiator, being part of the fittings for steam heating in the demised premises. These premises consisted of a suite of rooms in the basement of an apartment building in this City. The radiator which caused the damage had been attached to the ceiling in one of the bedrooms. The object of so doing was to place the radiator at such a height that the water formed by the condensed steam would flow back to the boiler which was also situated in the basement.

The defendant is a contractor and he constructed the building in question.

The evidence shows that the radiator was fastened in a very insecure and unsafe manner. Two strips of wood were fastened to it by screw nails and these strips were nailed to the plastered ceiling with ordinary wire nails which the plaintiff states were only two and a half inches in length. The thickness of the strips was at least seven-eighths of an inch and that of the lath and plaster six-eighths of an inch. This gave a very slight hold to the nail even if it struck the joist. But the County Court Judge was of opinion that the nails did not reach the joists, but simply went into the lath and plaster. The radiator was a heavy body weighing at least a hundred and fifty pounds.

The accident took place at about eleven o'clock at night, in January last. The tenant had no warning of the unsafe condition of the radiator until it actually fell. The weight of the structure simply pulled out the nails. In its fall it destroyed a child's crib. Fortunately, the child had been restless and it had been taken out of the crib a few minutes before the accident. The radiator in falling also injured a bed and dresser, and the steam, water and rust from the radiator and steam pipes destroyed a quantity of clothing and other goods. The damages were assessed by the Judge at \$103 and a verdict for that amount was entered for the plaintiff.

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The lease was in writing, under seal, and was put in evidence. It was prepared by the landlord, and its provisions were framed almost wholly in his interest, with a view to guarding him against every possible liability on his part, for his own negligence or that of his servants or that of other tenants in the building.

In considering the question as to the liability of the landlord for the injury in question, I will refer to the following provisions in the lease which, in my opinion, particularly affect this question, giving the actual wording as it appears in the document:

"The said lessee hereby covenant with the lessor as follows: \* \* \*

"Third.—That he.... ha.... examined and know.... the condition of said premises and ha.... received the same in good order and repair except as herein otherwise specified, and that no representations as to the condition or repair thereof have been made by the party of the first part (the lessor) or the agent of said party, prior to or at the execution of this lease, that are not herein expressed or endorsed hereon; \* \* \*

"Fourth.—That said Lessor shall not be liable for any damage occasioned by failure to keep said premises in repair, and shall not be liable for any damage done or occasioned by or from plumbing, gas, water, steam or other pipes or sewerage or the bursting, leaking or running of

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any cistern, tank, washstand, water-closet or waste pipe in, above or upon, or about said building or premises, \* \*

"Eleventh.—The Lessor agrees to furnish steam for steam-heating purposes in said building from the 1st day of October until the first day of May in the succeeding year; Provided, that the Lessor shall not be liable for any injury or damage arising from any cause beyond . . . . .control or from any defects in or accident to any of the heating, gas, electric light or water plant or service, in the said suite and premises, or from any act of negligence of any other tenant," etc.

I think the evidence would justify the Court in finding that the premises were in a dangerous condition at the time they were let to the plaintiff. But, assuming this finding to have been made, what remedy has he against his lessor? It is well settled law that, "fraud apart, there is no law against letting a tumble down house; and the tenant's remedy is upon his contract, if any": per Erle, C.J., in *Robbins v. Jones*, 15 C.B.N.S. 221.

In *Lane v. Cox*, [1897] 1 Q.B. 415, Lopes, L.J., said:

"There is no liability either on the landlord or the tenant to put or keep the demised premises in repair, unless such liability is created between them by contract. No contractual relation in this respect is implied on the letting of an unfurnished house. A landlord who lets a house in a dangerous or unsafe state incurs no liability to his tenant, or to customers or guests of the tenant, for any accident which may happen to them during the term, unless he has contracted to keep the house in repair."

The other two Judges of the Court of Appeal, Lord Esher, M.R., and Rigby, L.J., agreed with this statement of the law. These cases were followed and approved in *Cavalier v. Pope*, [1906] A.C. 428. I would also refer to *Brown v. Toronto General Hospital*, 23 O.R. 599.

In the present case there is no evidence of fraud upon the part of the lessor. The plaintiff has in fact, by the statements made by him in the third clause of the lease, expressly declared that there was no such thing as mis-



representation or concealment on the part of the lessor. Further, there is no covenant by the lessor to repair. On the contrary, liability of the lessor to repair is expressly negatived. The plaintiff, therefore, has no action either *ex contractu* or *ex delicto* against the defendant in respect of the injury arising from the dangerous state of the premises.

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It was argued that, because the defendant had agreed, as part of the contract, to heat the premises, the plant placed and used in the apartment block for heating purposes was under the control of the lessor and was not, therefore, nor was any part of it, demised to the plaintiff. Assuming that proposition to have been established, it was argued, on the authority of *Miller v. Hancock*, [1893] 2 Q.B. 177, that there was an implied covenant by the lessor to keep the heating plant in a sufficient state of repair. When, however, we examine the eleventh clause, we find that the lessor only agrees "to furnish steam for steam heating purposes in said building" during the period specified. But by the fourth clause his liability to repair the demised premises is expressly negatived and in the same clause it is declared that he shall not be liable for damage done or occasioned by plumbing, steam or other pipes. I can see no ground on which it can be held that the radiator and the pipes within the room in question did not form part of the demised premises. Then we find in the eleventh clause, immediately after the agreement to furnish steam, an express provision that the lessor should not be liable for damage arising from any defect in or accident to "any of the heating \* \* \* plant or service in the said suite and premises." The intention appears to be clear that, although the lessor agreed to furnish steam for heating, he should not be liable for any damage caused by defect, want of repair or accident.

For the reasons I have given, I have, with great re-

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luctance, come to the conclusion that the appeal must be allowed and the judgment in the County Court set aside. In view of the fact that the defendant let premises which he, as the builder of them, knew, or should have known, were dangerous to life and property, he should, although he has succeeded in evading liability in the present case, be denied any costs either in this Court or in the County Court.

CAMERON, J.A. The general rule is that in leases no covenant will be implied on the part of the landlord to do repairs of any kind. He does not "undertake that the premises will receive proper support, or endure during the term, or that they are fit for occupation, or for the purpose for which they are intended to be used." *Foa on Landlord & Tenant*, 144. It follows that the tenant cannot recover against the landlord for injuries sustained through want of repair: *Ib.* 145. This, however, does not do away with the liability of the landlord to keep in repair those parts of the premises remaining under his control, as was held in *Miller v. Hancock*, [1893] 2 Q.B. 177, and other cases.

There is here no question of representation, as that is expressly excluded by the third clause of the lease.

In England there has grown up an exception to the general rule that, in the letting of furnished houses and apartments, an undertaking is implied, on the part of the lessor, that they are reasonably fit for the purposes of habitation. In *Smith v. Marrable*, 11 M. & W. 5, it was decided that there is an implied condition of law that the landlord undertakes on leasing furnished premises, to let them in a habitable state. According to Lord Abinger, this was so obvious that he thought no authorities were necessary on the point, and that, where the premises were not habitable, the tenant was justified in repudiating the lease. This exception to the rule was confined to furnished houses in *Sutton v. Temple*, 12 M. & W. 52. In

*Hart v. Windsor*, 12 M. & W. 68, it was held that there is no implied warranty on the lease of a house that it is fit for the purpose for which it is let; and the decision in *Smith v. Marrable* was distinguished as being the case of the demise of a ready furnished house for a temporary residence. In *Wilson v. Finch Hatton*, 2 Ex. D. 336, it was decided that in the case of a furnished house there is an implied condition that the house shall be fit for occupation when the tenancy begins and *Smith v. Marrable* was approved. See *Gordon v. Goodwin*, 20 O.L.R. 329. This undertaking extends to every part of the premises, but applies only to their condition at the commencement of the tenancy: *Foa*, 148. The question has been raised by the Court of Appeal whether the exception does not apply to unfurnished houses taken for immediate occupation, but is left open: *Bunn v. Harrison*, 3 T.L.R. 146; but until affirmatively answered by that Court the law is as above stated: *Foa*, 148, note.

As to an unfurnished house the rule remains that there is no implied warranty on the part of the landlord that it is habitable. "The intending tenant is presumed to make his own inquiries as to its condition, and, in the absence of special stipulation, he takes the house as it stands:" *Halsbury*, XVIII, 532. "Fraud apart, there is no law against letting a tumble-down house, and the tenant's remedy is upon his contract, if any:" *Robbins v. Jones*, 15 C.B.N.S. 240; *Chappell v. Gregory*, 34 Beav. 250. "A landlord who lets a house in a dangerous or unsafe state incurs no liability to his tenant \* \* \* for any accident that may happen \* \* \* during the term unless he has contracted to keep the house in repair:" *Lane v. Cox*, [1897] 1 Q.B. 417. *Robbins v. Jones* is cited with approval in *Cavalier v. Pope*, [1906] A.C. 428. "No duty is cast upon a landlord to effect repairs unless he contracts to do so," per Lord James of Hereford at p. 431.

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It is stated in the *Am. & Eng. Encyc.* XVIII, p. 224, that,

"When there are concealed defects in the demised premises, attended with damages to an occupant and which a careful examination would not discover, but which are known to the landlord, the latter is under an obligation imposed by law to reveal them, in order that the tenant may guard against them; and upon the landlord's failure to perform this duty he will become liable for whatever damages naturally result to the tenant therefrom."

This is also stated in other words in *Cyc.* XXIV, p. 1114.

"Even in the absence of an express covenant to repair, where the landlord leases the premises with the knowledge of latent defects therein, which he conceals from the tenant, he is liable for all injuries resulting to the tenant from such defects in the premises."

In *Finney v. Steele*, *Am. & Eng. Ann. Cas.* XII, p. 510, various authorities are cited for the above, and in particular a decision of the Supreme Court of Tennessee, where it was held that the landlord, in the case of a lease of unsafe premises, is liable, if he knows of the defect or could discover it with reasonable care and diligence. We were also referred to *Steefel v. Rothschild*, *Am. & Eng. Ann. Cas.* I, 676.

This is, no doubt, the view taken by the Courts of the United States, and there is much in the view to be commended. In the case before us the owner of the building was also the contractor who erected it, and it can fairly be argued that he, through his agents and workmen, was cognizant of the condition of the structure.

I do not find, however, that the distinction so drawn between defects that are apparent and discoverable by inspection and those that are latent and not discoverable with ordinary care and diligence has been recognized by the English authorities, which we are bound to follow.

The English decisions have gone so far as to recognize an implied warranty or condition in the case of furnished houses (that they are fit for habitation), but have not as yet gone further, though it was intimated in *Bunn v. Harrison, supra*, that the question might, to a certain extent, still be held to be an open one. Until, however, a direct ruling to that effect is given, we are obliged to follow the decisions of the English Courts, and hold that there is no implied warranty or condition applicable to this case.

It was argued that, inasmuch as the defendant was bound to heat the premises, the radiator was part of the general heating system used in the building under his control and that, therefore, he remains liable. We were referred to *Cyc. XXIV*, 1115; *Miller v. Handcock*, and *Iowa Apartment Co. v. Herschel*, Am. & Eng. Ann. Cas. XXIV, 206. But the radiator here was clearly part of the demised premises. It was intended so to be and was in the possession and under the control of the tenant. The obligation of the landlord with respect to it was to keep it supplied with steam during the stipulated period. It cannot be reasonably said that the defendant retained control of the radiator in the sense that he retained control of the stairways or halls used in common by all the tenants and by strangers. The cases cited on this branch do not seem to me applicable.

Apart from the foregoing considerations of general application, we have in this case a document under seal containing elaborate provisions defining the rights and liabilities of the parties.

The lessee is bound "to keep clean and in good and perfect order and condition all furniture, fittings and fixtures in said building" (clause 6); he agrees that he has received the premises in good order and repair, that no representations have been made in regard thereto, and that he will return the same in as good condition as when

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entered upon (clause 3). The lessor is not to be liable for damage by failure to keep in repair or for any damage done "by or from plumbing, gas, water, steam or other pipes" (clause 4). The lessor agrees to furnish steam heating, but is not to be liable for "any injury or damage arising \* \* \* from any defects in or accidents to any of the heating, gas, electric light or water plant or service in the said suite or premises" (clause 11).

Here, then, is a contract under seal and the radiator in question, a part of the heating plant in the suite, is clearly included in the contract, and the defendant is declared free from liability for any damage arising from a defect in the heating plant. On the other hand, the lessee is bound to keep in order all fixtures and fittings in the premises. It does seem to me, therefore, that the express provisions of this contract lead to no other conclusion than that the defendant is exonerated from liability.

I am of the opinion that the appeal must be allowed.

HAGGART, J.A. Under the demise in question there is no implied obligation to the tenant that the house is or shall continue fit for the purpose for which it is leased. There is a contract for title which amounts to a covenant for quiet possession.

Baron Parke, in *Hart v. Windsor*, 12 M. & W. p. 85, says:

"There is no authority for saying that these words imply a contract for any particular state of the property at the time of the demise and there are many that clearly show that there is no implied contract that the property shall continue fit for the purpose for which it is demised. \* \* \* It appears, therefore, to us to be clear upon the authorities that there is no implied warranty on a lease of a house or of land that it is or shall be reasonably fit for habitation or cultivation. The implied covenant relates only to the estate and not to the condition of the property."

The plaintiff urged that there was a duty which the defendant owed to the plaintiff, and a breach of that duty was evidenced by the character of the accident, and cited some American authorities to support his contention; but I cannot find any English cases along those lines.

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The English authorities do not support that proposition. A landlord who lets an unfurnished house in a dangerous condition, he being under no liability to keep it in repair, is not liable to his tenant or to a person using the premises for personal injuries happening during the term and due to the defective state of the house: *Lane v. Cox*, [1897] 1 Q.B. 415. See *Cavalier v. Pope*, [1906] A.C. 428; *Cameron v. Young*, [1908] A.C. 176.

Here the rights and obligations of the respective parties are settled by the demise in writing signed and sealed by the plaintiff and the agent for the defendant. This lease was prepared by the defendant and contains all the stipulations that an ingenious lawyer could suggest for the protection of the lessor, but it is unimpeached, and we have to interpret it.

Clause indicated as "Third" stipulates that the plaintiff "has examined and knows the condition of said premises \* \* \* and that no representations as to the condition or repair thereof have been made by the party of the first part" (the lessor). And clause "Fourth" provides "that the said lessor shall not be liable for any damage occasioned by failure to keep said premises in repair and shall not be liable for any damage done or occasioned by or from \* \* \* steam or other pipes," and in clause "Eleventh" it is covenanted "that the lessor agrees to furnish steam for steam heating purposes in said building from the 1st day of October until the 1st day of May in the succeeding year; Provided that the lessor shall not be liable for any injury or damage arising from any cause beyond . . . . control or from any defects

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CAMERON, I have eliminated from the different clauses what does  
J.A. not apply to the questions involved in this suit.

The relations between the parties are contractual and are definitely set out in the writing and, if the plaintiff ever might have had any claim for such an accident, he has contracted himself out of his remedy.

The plaintiff strongly urged that the radiator which broke loose from its fastenings was not a part of the demised premises and that it was retained in the possession and control of the defendant. I could not agree with this contention. The surface at any rate which radiated the heat was a part of the demise, although under the last proviso the defendant had a qualified property in it and control for the purpose of furnishing the steam heating.

I must say that I would like to have been able to support the plaintiff's verdict.

Some American cases are authority for a more humane law. And some of our Canadian judges in similar cases have said they would like to follow them. The foregoing is the English law.

We must give force to the written agreement deliberately entered into between the parties.

The appeal should be allowed, but the defendant should not have his costs in the Court below or of this appeal.

HOWELL, C.J.M., and RICHARDS, J.A., concurred.

*Appeal allowed.*



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## COURT OF APPEAL.

## WEPPLER V. CANADIAN NORTHERN RY. CO.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*Negligence—Common employment—Volenti non fit injuria—Defect in system of carrying on work—Liability of employer at Common Law.*

1. The doctrine that an employer is not liable at Common Law for injuries caused to a workman by the negligence of a fellow servant does not apply to actions for injuries resulting from defective places in which to work, defective machinery with which to work, or defective or dangerous systems of carrying on work deliberately adopted by the employer or those entrusted by him with the superintendence of the work.

*Ainslie v. McDougall*, (1909) 42 S.C.R. 420; *Brooks v. Fakkema*, (1911) 44 S.C.R. 412, and *Smith v. Baker*, [1891] A.C. 325, followed.

The plaintiff was employed at boring holes in pieces of iron by means of four drills operated from one common shaft in the defendants' machine shop under the direction and control of certain foremen. The four drills revolved together and one could not be stopped without all being stopped at the same time. Each drill could, while in motion, be moved from side to side or raised to a height of six inches above the piece of iron to be bored. At first the plaintiff was allowed to stop all the drills during the operation of removing a completed job and placing and clamping on the table a new piece of material to be bored; but, afterwards, two workmen including the plaintiff were required to work with the same set of drills and to change the material to be bored without stopping the drills, in order to save time. This was by the order of the head foreman in that particular shop confirmed by the superintending foreman over all the defendants' repair shops in Winnipeg. The plaintiff objected to the new mode of operation as being dangerous to him, but without avail; and, shortly afterwards, his sleeve was caught in one of the rapidly revolving drills while he was engaged in adjusting and clamping a new piece of material on the table and his arm was rendered useless.

The jury found that the plaintiff's injury was caused by the negligence of the defendants in keeping the machinery running during the operation of changing material to be drilled.

*Held*, that the findings of the jury were justified by the evidence, that the facts brought the case within the principle above stated and that the plaintiff was entitled to recover at common law.

2. The maxim *volenti non fit injuria* does not apply to the case of a workman who, although knowing the danger of continuing to work under the conditions required of him, yet, after protesting against

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it, continues to work under the conditions imposed because he must either do so or give up his employment.

*Smith v. Baker*, [1891] A.C. 325, and *Williams v. Birmingham*, [1899] 2 Q.B. 338, followed.

ARGUED: 21st October, 1913.

DECIDED: 7th November, 1913.

**Statement.** THE plaintiff was working at a gang drill in the Canadian Northern railway shops, Fort Rouge, on the 1st of April, 1912, when his arm was caught by the drill and twisted so that it was very badly broken and mutilated. The plaintiff alleged that there was a defect in the machine which made it difficult to shut the power off and thus bring the machine to a standstill. The plaintiff also alleged that he had orders from the shop "speeder" not to stop the machine when putting in and taking out work, as it lost him too much time.

The defendants pleaded contributory negligence, and alleged that the accident was due entirely to the carelessness of the plaintiff and to the fact that his smock was in rags, one of which ends caught in the drill and caused the accident; that there was no defect whatever in the gang drill, which was modern and up to date in every respect; and that the accident could have been avoided by the exercise of reasonable and proper care on the part of the plaintiff.

The case was tried at the assizes before Curran, J., and a jury, when a verdict was brought in for the plaintiff for \$4,500, upon which judgment was pronounced in favour of the plaintiff.

The defendants appealed.

*O. H. Clark, K.C.*, for defendants, appellants, cited *Schwob v. Michigan Central Ry. Co.*, 9 O.L.R. 86, and *Lawrence v. Kelly*, 19 M.R. 367.

*T. J. Murray* for plaintiff, respondent, cited *Brooks v. Fakkema*, 44 S.C.R. 412; *Ainslie v. McDougall*, 42 S.C.R. 420, *Lafvendal v. Northern Foundry Co.*, 22 M.R. 207, and *Smith v. Baker*, [1891] A.C. 325.

HOWELL, C.J.M. Four drills in a row all operated from one counter shaft and so connected that all must run or stop together, used for boring holes in iron or steel, were operated in the defendants' shops under the direction and control of certain foremen. The drills could be moved from side to side and while in motion could individually be raised out of the work and, when thus raised from the work which was being done at the time of the accident, there could be a clear space of six inches between the point of the rapidly revolving drill and the material upon which the work was being done.

The plan of operating required two workmen to put material upon the table beneath the drills and then lower the drills to the material which had been so fixed as to have the holes bored in the proper place.

The plaintiff had, about three weeks before the accident, entered into the defendants' employment and had at once been put to work upon this multiple drill and soon after one McGrath, an apprentice, was set to work with him as a helper or assistant and so continued until the accident. Each of these men had previously operated a single drill, but neither had ever before operated a multiple drill. Their work at first was what is called single piece work, that is one piece of metal occupying the whole space covered by the four drills was placed upon the table and holes were bored where required. As soon as the work on this was done the drills were lifted, the machine was stopped and not again started until other material was placed and clamped or fixed for new work. It was thus quite safe for the men to remove or adjust the material. After about two weeks so working the plaintiff and his assistant were given what the defendants call two piece work, that is, each was required to do work independently upon separate pieces of material, the plaintiff using the two right hand drills and the helper the other two. At first the two men conducted this work

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as formerly and, when it became necessary to turn the material or put in a new piece, the machine was stopped and, if each had not finished his piece, the work of the one not so finished was suspended until the other put in or changed the material and clamped it down.

The defendants' foreman having general charge of the machinery, seeing this method of procedure, interfered and told the plaintiff and his helper that the drills must not be stopped to change the work. The plaintiff and his helper thought it unsafe and continued as before and soon after that foreman and a higher foreman of the defendants' shops came up and instructed the plaintiff and his helper that the drills must not be stopped to change material and thereafter they endeavored to conform to this system of working and both swear that they thought it dangerous.

The general foreman of all the shops, one Galloway, swears that the plan or system of operating this four drill machine insisted upon by these two foremen was approved of by him, and at the trial counsel for the defendants urged that it was the proper system and there was no intimation that the two foremen acted improperly or beyond their powers.

The material or structure upon which they were working on this two piece work took up about one foot of space above the table, and was required to be bolted to the table by an iron bar, called a strap, going over the top fastened on each side by a bolt about one foot long. To adjust this strap it was necessary for the plaintiff to put his arm over the material and reach down to the table in proximity to the drill. Soon after this change, and while the drill was rapidly revolving, the plaintiff while so adjusting the strap, had his sleeve caught in the rapidly revolving drill and his right arm was rendered useless.

The case for the defence is that, if the table with that

sized material upon it had been properly adjusted, there would have been six inches of space between the material and the lower end of the drill after it had been run up, and that this would be safe.

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Counsel for the defendants urged strongly that, if this method of working was dangerous, the plaintiff was fully aware of it and accepted the risk and relied upon the maxim, *volenti non fit injuria*.

In *Woodley v. Metropolitan*, 2 Ex.D. at 389, Cockburn, C.J., says:

“Morally speaking those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible. \* \* The workman who depends on his employment for the bread for himself and his family is thus tempted to incur risks to which, as a matter of humanity, he ought not to be exposed. But, looking at the matter in a legal point of view, if a man for the sake of the employment takes it or continues it with a knowledge of its risks, he must trust to himself to keep clear of injury.”

The same cold blooded law was laid down twenty years previously by Lord Bramwell and Channell, B., in *Dynen v. Leach*, 26 L.J. Ex. 221.

Happily, it seems to me, for humanity's sake, the House of Lords in *Smith v. Baker*, [1891] A.C. 325, laid down the law the converse of the above. Lord Herschell there states that the mere fact of the employee continuing his work, knowing the risk and not remonstrating, does not thereby preclude him from recovering. One English Judge uses this expression: “His poverty, not his will, consented to incur the danger.” The defendant must set up and prove affirmatively: 1st, that the plaintiff well knew the danger and the risks, and 2nd, that the plaintiff contracted or consented to run the risk. Mere proof that the plaintiff knew the danger and continued in his employment is not conclusive evidence to prove the second point. Such evidence may be

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given fully and completely showing that the plaintiff had full knowledge of the danger and continued the work, and yet the tribunal finding the facts may find the plea not proved: *The Montreal Park v. McDougall*, 36 S.C.R. 1; *Williams v. Birmingham*, [1899] 2 Q.B. 388.

Many American cases seem to hold the contrary and, after a careful review of them and of the English decisions, a writer in 20 *Harvard Law Review*, at 115, uses the following language:

"Thus it has been seen that, while in England the pressure of the servant's necessities has finally come to be regarded as destructive of his free will when placed in a position where he must either encounter some probable though not imminently threatening danger, or else give up his employment, the American cases stoutly deny it any such effect."

The charge of the learned Judge was not out of harmony with this law, and the jury did not find this fact in favour of the defendants. The defendants failed on this plea.

The defendants also contended that there was no Common Law liability and that at most there was only liability under the statute.

The defendants possessed a four drill machine and wished to operate it so that each of the two men would operate two drills and, to operate it most economically, all the drills must be kept revolving continuously, thus changing the system of operation from that of one piece work.

If it had been constructed so that each two drills were connected with the shaft separately, then each could be stopped independently, and then there would be no necessity for continuous running. If a guard by way of a bar of iron or strip of wood had been fixed between the workman and the lower end of the drill when raised to the highest point, so that the lowest point of the drill was an inch higher than the lower side of the guard, the



workman's arm would be protected. If the workmen had been permitted to use this machine for two piece work—it being manifestly constructed for one piece work—as they first used it, there would have been no danger; there would have been a little loss of time, but there would not have been an accident.

A model of the structure being drilled and the strap or bolts was before the jury and was also shown to the Court and some of the witnesses thought it dangerous.

The defendants erected or constructed this machinery and established a system for operating it on "two piece" work, and I agree with the jury that the system was a dangerous one. If either of the three above described plans had been taken it would have been reasonably safe.

The defendants, by requiring the plaintiff to work at this machine so that he must put his arm in such close proximity to the revolving drill, did not provide him with a reasonably safe place for the performance of his work and, in my view of the law, the defendants are liable at common law. See *Ainslie v. McDougall*, 42 S.C.R. 424; *Brooks v. Fakkema*, 44 S.C.R. 412, and *Lafvendal v. Northern Foundry*, 22 M.R. 207.

The appeal must be dismissed with costs.

RICHARDS, J.A. The work was dangerous in any case, and, admittedly, much more dangerous while the drills were kept running during the changing of the material to be bored. The order to so keep running was given, the defendants say, to economize time, and to get more work turned out in a day. Galloway, the foreman over all the shops, and Hobkirk, whose work was to see that work was speeded, and Hough, the foreman of the shop in which the plaintiff was injured, were all aware of the increase in the danger. Knowing that such increase would result, Galloway and Hobkirk, nevertheless, decided to, and did, order the continuous running of the drills.

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Dolton, an expert witness for the defence, stated that the machine could be instantly stopped with a brake, and that he had seen an electric brake used for that purpose. The saving of time, by the use of such a brake, would, probably, have so minimized the time lost in stopping as to make its loss of little importance. There is no evidence that Galloway, Hobkirk and Hough did not know that a brake could be so used.

There is also no evidence that, when so ordering, they considered the question of guarding against the increased danger. There is no evidence to shew that it could not be guarded against.

There is no evidence that a guard could or could not be so placed as to decrease or prevent the danger. It seems to me, however, that, as the drills did not move towards, or from, the operator, but only in a straight line to one side or the other, a valuable guard could be made by placing two pieces of iron above, and along the line of, and from end to end of, the table.

There could be a space between these pieces sufficient to allow the drills to move freely laterally and up or down. They could be at such a height that their lower edges would be a little below the points of the drills, when the latter were raised. Though there is no evidence that such a guard could have been used, common sense suggests that it could.

But, even if no such guard or brake could be used, I cannot see that the gain in time justified such an increase in the danger to the operator as was caused by the continuous running, especially as some of the evidence seems to shew that the loss was largely the result of defects in the working of the apparatus by which the belt was shifted.

The argument that it was the ordinary usage to run such drills continuously does not seem to me to be borne



out by the evidence. On the contrary there is much evidence that it was not.

It is argued that the continuous running was not a part of a system, for a defect in which the defendants would be liable at common law if it resulted in injury.

It was urged that the injury was merely brought about by the order of a fellow servant of the plaintiff, whose orders the plaintiff was bound to obey, and that, therefore, there was no liability beyond that provided by the Workmen's Compensation for Injuries Act. If that were so, the verdict of \$4,500 would have to be reduced to \$2,150, the agreed limit of liability, in this case, under that Act.

I am unable to agree with such a contention. The evidence shews that the system of running the machines was settled on by Galloway as part of his duty as a servant of the defendants, and that the defendants delegated to him the performance of their duty to provide the system.

In *Ainslie v. McDougall*, 42 S.C.R. at 426, Sir Louis Davies, in a judgment concurred in by Duff and Anglin, J.J., says:

"Defective places in which to work, defective machinery with which to work, and defective systems of carrying on work, are, none of them, I hold, within the exception grafted upon the rule holding an employer liable for the negligence of the men in his employ."

That decision was approved of and affirmed in *Brooks v. Fakkema*, 44 S.C.R. 412. It binds this Court and, in my view of the present facts, disposes of the fellow servant defence.

The plaintiff realized the danger, but continued to work. It is argued that he thereby voluntarily assumed the risk. The verdict of the jury here and the decision in *Williams v. Birmingham*, [1899] 2 Q.B. 338, negative that defence.

I would dismiss the appeal with costs.

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PERDUE, J.A. The only point in this appeal as to which, in my opinion, there is any difficulty is that in relation to the common law liability of the defendants for the accident in question.

There is sufficient evidence to show that the defendants' shop engineer, Hobkirk, and their machine shop foreman, Hough, ordered the plaintiff to keep the drills running while the material to be bored was being inserted and removed. The evidence also shows that Galloway, the general foreman of the defendants' shops, approved and adopted this plan of operating the drilling machine, and that the object of it was to get more work done in a given time by the machine and the men employed on it. There is ample evidence that this mode of operation was dangerous to the men using the machine. Galloway was foreman over all the other foremen and had general control of all shops of the defendants at Winnipeg in which repair work to locomotives is done.

I think it should be held that the plan of operation devised and put in practice by Galloway and his subordinates, in the interests of the defendants, was adopted by the defendants. The defendants placed these men in control of the shop and of the workmen engaged in tending the machines. The defendants reaped the benefit of the speedier but more dangerous plan of operation.

There is, as I have stated, ample evidence to show that the operation of the drilling machine while it was constantly kept in motion was dangerous to the men employed upon it. If the plaintiff had been permitted to use the machine as he desired, that is, by stopping it while the material to be drilled was being changed, the operation of it would have been attended with much less danger. In *Smith v. Baker*, [1891] A.C. 325, the Common Law principle is stated by Lord Watson in these words: "A master is no less responsible to his workman for personal injuries occasioned by a defective system of

using machinery than for injuries caused by a defect in the machinery itself," (page 353).

He further says:

"The judgment of Lord Wensleydale in *Weems v. Mathieson*, 4 Macq. 226, clearly shews that the noble and learned Lord was also of opinion that a master is responsible in point of law not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used."

I would also refer to *Ainslie v. McDougall*, 42 S.C.R. 420, and *Brooks v. Fakkema*, 44 S.C.R. 412, as embodying and applying the same principles.

I think the appeal should be dismissed with costs.

HAGGART, J.A. I do not think the defendants seriously contended that they were not liable under The Workmen's Compensation Act, which would have limited the damages to \$2,150, but counsel strongly urged that there was no liability at Common Law, where the damages were assessed by the jury at \$4,500, and they further contended that at most the cause of the accident was a negligent order given by a fellow workman and that consequently the doctrine of common employment applied to the Common Law action.

The plaintiff in his pleadings charged that the defendants employed a dangerous and negligent system of carrying on their business and used and employed defective machinery to enable the plaintiff to discharge his duty.

The trial Judge, after explaining the issue very clearly to the jury, says in his charge:

"And it is for you to say, from all the evidence you have heard, whether or not the adoption of that system by the defendants was negligence and whether or not that negligence resulted in the plaintiff's injury, or whether or not it resulted from an order. If you cannot find it was part of their system, you can find whether or not it was a result of an order or direction given by an employee of the Company who had the power and right to give such an order to one under his control."

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And amongst others he submitted to the jury the questions which, with their answers, are as follows:

"Q. Did the defendants adopt any system in regard to the operation of the gang-drill in question. A. Yes.

Q. If so, was the defendant guilty of negligence in respect of the system so adopted? A. Yes.

Q. If so negligent, in what did the negligence consist, and was the plaintiff injured in consequence thereof? A. Yes, in keeping the machinery running while drilling that kind of work."

I do not think it matters much whether we refer to the operation of this drill by the plaintiff as a negligent system, a negligent use of a good system, a defect in original installation or a negligent mode of using perfectly sound machinery, because it resulted in creating a dangerous place for men to work, and in substance the jury so found. The happening of the accident under the circumstances detailed is evidence of this fact. The plaintiff and his witnesses testify that it was a dangerous place; McArthur, a witness called by the defendants, gave evidence to the same effect, and even Hough, the defendants' foreman, on his examination for discovery, swore that the place was one of danger, although he tried to explain or qualify this when in the witness box. There was ample evidence, and the jury believed the plaintiff and his witnesses, and their finding is, in substance, that the construction of the works and the manner in which they were operated were dangerous to the workmen.

In *Ainslie v. McDougall*, 42 S.C.R. 420, it was held that an employer is under an obligation to provide safe and proper places in which his employees can do their work and cannot relieve himself of such obligation by delegating that duty to another, and it follows that, if an employee is injured through failure to fulfil such obligation, the employer cannot, in an action against him for damages, invoke the doctrine of common employment.

Davies, J., on p. 424, says:

"I hold that the right of the master, whether incorporated or not, to invoke the doctrine of common employment as a release for negligence, for which he otherwise would be liable, cannot be extended to cases arising out of neglect of the master's primary duty of providing, in the first instance at least, fit and proper places for the workmen to work in and a fit and proper system and suitable materials under and with which to work. Such a duty cannot be got rid of by delegating it to others."

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Common employment is not a defence to actions for injuries resulting from defective places in which to work, defective machinery with which to work and defective systems of carrying on work.

*Ainslie v. McDougall* was followed in *Brooks v. Fakema*, 44 S.C.R. 412. See also *Smith v. Baker*, [1891] A.C. 325; *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72; *Williams v. Birmingham Battery Co.*, [1899] 2 Q.B. 338.

I think the action lies against the defendant both under The Workmen's Compensation Act and at Common Law. Although as a juror I might not assess the damages at the amount mentioned in the verdict; yet, when we consider the months in the hospital, the pain of many operations and the existence of a serious permanent injury, it is not so excessive as to warrant the interference of the Court.

I would dismiss the appeal.

CAMERON, J.A., concurred.

*Appeal dismissed.*

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## COURT OF APPEAL.

## RE GIMLI ELECTION (No. 1).

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*Election petition—Manitoba Controverted Elections Act, R.S.M. 1902, c. 34, ss. 33, 34, 35—Extension of time for service of petition—Substituted service—Powers of Judge—Appeal—Judge rescinding his own ex parte order.*

*Held*, (RICHARDS and HAGGART, J.J.A., dissenting) that, under sections 33 and 34 of the Manitoba Controverted Elections Act, R.S.M. 1902, c. 34, a Judge has power, in a proper case, to make successive orders extending the time for service of an election petition, and that, under section 35 of the Act, an order for substituted service may, on good cause being shown, be made after the expiration of the time allowed by any order extending the time for personal service.

*Held*, also,

1. An appeal to the Court of Appeal lies from any interlocutory order made by a Judge in the matter of an election petition under the Act.

*Re Shoal Lake Election*, (1887) 5 M.R. 57, followed.

2. *Per* PERDUE and CAMERON, J.J.A., (RICHARDS and HAGGART, J.J.A., dissenting) that a Judge has no power to rescind his own order made upon an interlocutory application in an election petition although made *ex parte*.

ARGUED: 9th October, 1913.

DECIDED: 27th October, 1913.

**Statement.** THE petition in this case was filed under the Manitoba Controverted Elections Act, R.S.M. 1902, c. 34, to set aside the election of the respondent as member for Gimli in the Legislative Assembly of this Province.

It was filed on 5th July, 1913, and on 9th July, an order was made by Mathers, C.J., extending the time for service of the petition and other documents up to and including the 19th day of the same month. On 18th July a further order was made by Mathers, C.J., extending the time for service up to and including the 28th day of July. This order was granted upon affidavits showing unsuccessful efforts to serve the respondent, that he was outside the Province of Manitoba and that it was uncertain when he would return.

On 24th July Mathers, C.J., made an order that substitutional service of the petition, etc., be made by serving two of the respondent's partners in the law firm of which he was a member, and by mailing copies of the papers to be served to the respondent at Kenora.

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All the above orders were made *ex parte*.

On 20th August, 1913, Mathers, C.J., made an order on the application of the respondent, and after hearing both parties, setting aside the orders of the 18th and 24th July. He acted upon the view that he had only power to extend the time for service once and that then the power was exhausted. He therefore set aside the order of the 18th July on that ground. He further held that the order for substitutional service must be made within the time prescribed by the Act or the extended time allowed by a Judge, and not afterwards. Acting wholly upon that view, he set aside the order of the 24th July.

The following judgment on the hearing of the application was delivered by

MATHERS, C.J.K.B. The respondent applies to set aside a second order extending the time for service of the petition herein upon him pursuant to sections 33 and 34 of the Controverted Elections Act, R.S.M. 1902, c. 34. The petition was filed on the 5th day of July last, and on the 9th day of July I made an order extending the time for service for ten days. Upon the 18th of July, upon an application being made to again extend the time for service of the petition, I suggested to the counsel applying a doubt as to my jurisdiction to make the order asked for; but, not then having the means at hand of otherwise satisfying myself on the point, I accepted counsel's assurance, I have no doubt honestly given, that I had the power, and granted the order. Subsequently I made a further order pursuant to section 35 of the Act allowing substitutional service to be made upon one of Mr. Taylor's partners. Each of these orders was made

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C.J.

upon material which I then thought, and still think, fully justified me in making it, if I had the necessary jurisdiction. The contention of counsel for the respondent is that only one order extending the time fixed by the statute for the service of the petition can be made under the sections of the Act mentioned; that this power was exhausted by the first order made, and that the second order was therefore without jurisdiction; that, the time fixed by the first order having expired, there was no authority to order substituted service of the petition.

Counsel for the petitioners argued that the power to extend the time was not limited to making one order, but that it may be exercised from time to time as the occasion arises. But, even if there was no jurisdiction to grant the second extension, the order for substituted service is good, as such an order may be validly made after the expiration of the time fixed for service. The order for substituted service was made within the time allowed by my second order extending the time, but after the expiration of the time fixed by the first order. Its validity, therefore, may depend upon whether or not I had any jurisdiction to make the second order, or, in other words, whether the power given by sections 33 and 34 to extend the time for service was exhausted when it was once exercised, or can be exercised from time to time.

I do not think section 33 makes provision for one extension of time by a judge and that section 34 provides for another and additional extension, as was argued by Mr. Hudson. To my mind section 33 deals with the limit of time within which service must be made; that is, either within the time fixed by the statute or the additional time fixed by a Judge. It may be that the five days fixed by the Act will be sufficient. In that event no application to a Judge becomes necessary. But if difficulties are encountered, or the circumstances are



special, an application may be made to a Judge under section 34. That section deals with the manner in which the additional time mentioned in section 33 may be obtained.

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Neither counsel was able to refer me to any case in which the precise point here involved was dealt with either under this or any analogous statute, and my own industry has not been any better rewarded. The only authority for extending time under the local Act is that contained in sections 33 and 34. It contains no general provision such as there is in the Dominion Act (sec. 87). Under the Judicature Act the provision for renewing a writ of summons allows the power to be exercised from time to time. Ontario Rule 133, English Order 8, Rule 1. By section 32, sub-section 2, of the Imperial Interpretation Act (1899), 52 & 53 Vic., it is provided that, where an Act confers a power or imposes a duty upon a holder of an office as such, then, unless the contrary afterwards appears, the power may be exercised from time to time.

In *Craie's Statute Law*, at p. 243, it is said that the substantial effect of this provision is to rebut the presumption that the power is exhausted by a single exercise.

The jurisdiction of a Judge under the Controverted Election Acts is purely statutory. He has no Common Law jurisdiction. The powers conferred must be exercised in the mode prescribed and cannot be enlarged by implication and *expressio unius est exclusio alterius*.

The general principle appears to be that, when a statute gives power to extend time and does not provide that the power may be exercised from time to time, the power can only be exercised once for all. The case of *Power v. Griffin*, 33 S.C.R. 39 (1902), referred to by Mr. Andrews, was decided on that principle. That was a decision under the Patent Act. Under section 2 of that Act the Commissioner had power to extend the time

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within which a patentee must commence to manufacture his invention on proving that he was prevented from commencing for reasons beyond his control. The Commissioner granted an extension of twelve months and subsequently another extension for twelve months more. The Supreme Court held that the power which the Commissioner had under the Patent Act was exhausted by the first extension and he had no power to grant another. It seems that he might have granted the whole two years' extension by the first order; but, as there was no power to grant extensions from time to time, he could only exercise the power once. I can see no reason for refusing to apply that general principle to the construction of this Act. I have therefore come to the conclusion, after careful consideration, that the power of extending time for service of an election petition under sections 33 and 34 can be exercised only once and not from time to time. The order made by me on the 18th July was consequently without authority and must now be set aside.

Then was there any power to make an order for substituted service after the expiration of the time fixed by my first order extending the time for service of this petition?

It was decided by the Full Court of New Brunswick in the York County Election, *McLeod v. Gibson*, 35 N.B. 376 (1901), that, under section 10 of the Dominion Controverted Elections Act, R.S.C., c. 9, as amended in 1891 (now s. 18, c. 18, R.S.C. 1906), an order for substituted service of an election petition was properly made after the expiration of the time fixed by a Judge for service of the petition. In that case the petition was filed on the 17th of December. On the 21st of December an order was made extending the time for service for twenty days from the date of the order. The extended time expired on the 10th of January. On the 5th of January the petition was personally served on a person

believed to be, but who in fact was not, the respondent. This fact coming to the knowledge of the petitioners, they, on the 16th of January, applied for and obtained an order for substituted service. A motion was afterwards made to rescind this last mentioned order but it was held that the order was properly made. The decision in this case seems to be, if I may say so, entirely correct upon the wording of section 10 of the Dominion Act. According to that section, if service cannot be effected upon the respondent personally "*within the time granted by the Court or Judge,*" then it may be effected in such other manner as the Court or Judge directs. The petitioner has the whole of the extended time within which to endeavor to make personal service. If he cannot serve the petition within that time, the Court or Judge may direct some other mode of service. The order of the 18th of July being null, the situation was exactly as it was in *McLeod v. Gibson*. In each case one order had been made extending the time for service and the time so extended had expired when the order for substituted service was made. The only difference in the two cases is that *McLeod v. Gibson* had to deal with section 10 (now section 18) of the Dominion Act, and this case is governed by section 35 of the Manitoba Act. If these two sections are the same in effect, this application must be decided against the respondent.

The question is, are they the same in effect? Section 35 says, "If the respondent or respondents cannot be served personally, or at their domicile, service may be effected upon such other person and in such other manner as any judge, on the application of the petitioner, may appoint." Under sections 33 and 34 the time within which the petition must be served is fixed. Section 35 only provides for an alternative mode of service if personal service cannot be effected. But, whether the

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service be personal or otherwise, it must be made within the time fixed under sections 33 and 34.

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That is so in the case of a statement of claim in an action, and I cannot see anything in section 35 to indicate that it should be given a different construction. A statement of claim or writ of summons, whether served personally or substitutionally, must be so served before the expiration of the time allowed for service. Under the Dominion Act, owing to the use of the phrase "within the time granted by the Court or a Judge" in section 10, substituted service of the petition may be allowed after the time fixed for personal service has expired. The absence of that significant phrase from section 35 makes an all-important difference in the construction of the two sections. In my opinion an order for substituted service under section 35 cannot be made except during the currency of the time allowed for service under sections 33 and 34. The result is that, the order of the 18th July being set aside, the order for substituted service and the service of the petition made pursuant thereto must fall with it.

As the point is an entirely new one I think there should be no costs.

Petitioners appealed.

A. B. Hudson and J. B. Coyne for appellants, petitioners, cited *Re Morris*, 17 M.R. 330; *Re North Cypress*, 8 M.R. 581; *Re Brandon*, 9 M.R. 514; *Re Marquette*, 11 M.R. 381; *Re McNichol and Winnipeg*, 22 M.R. 305, 2 W.W.Rep. 470; *Re North Grey*, 2 O.W.R. 604; *Power v. Griffin*, 33 S.C.R. 39; *Payne v. Deakle*, 1 Taunt. 509; *Anonymous*, 2 Chitty, 45; *Barrett v. Parry*, 4 Taunt. 658; *Leggett v. Finlay*, 6 Bing. 255; *Re Sunbury and Queens Election*, 37 C.L.J. 509; *Re York Election*, 37 C.L.J. 430; *McAllister v. Reid*, 37 C.L.J. 204; *McLennan v. Chisholm*, 20 S.C.R. 38; *Regina v. Allen*, 31 U.C.R. 458, 493, and *Re Chambers and C.P.R.* 20 M.R. 277.

A. J. Andrews, K.C., and F. M. Burbidge for respondent cited *Re Morris Election*, 17 M.R. 330; *Re Centre Wellington Election*, 44 U.C.R. 132; *Re Cross and Carstairs*, 4 W.W.Rep. 412, 47 S.C.R. 559; *Shaw v. Nickerson*, 7 U.C.R. 541; *Robertson v. Coulton*, 9 P.R. 16; *Re Shoal Lake Election*, 5 M.R. 57; *Re Gleggarry Election*, 20 S.C.R. 38; *Re Peterborough West Election*, 41 S.C.R. 410; *Kerfoot v. Yeo*, 19 M.R. 512; *King Election Case*, 8 S.C.R. 195, and *Power v. Griffin*, 33 S.C.R. 43.

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HOWELL, C.J.M. Section 33 of the Act respecting Controverted Elections, R.S.M. 1902, c. 34, provides that the petition shall be served within five days or within such further time as a Judge shall order. Section 34 provides that "Such service may be made within such longer time as any Judge may grant, regard being had to the difficulty of effecting service or to special circumstances."

I assume the Legislature meant something by this last mentioned section, and that it was not intended as a repetition of the powers set forth in the former section. The law compels me to give a reasonable interpretation to both sections and this can be done in the very language of section 34. If service has not been effected according to section 33, that is within five days or within the extended period, then "such service may be made within such longer time as any Judge may grant"—not necessarily the Judge who made the first order, but *any* Judge may grant *such longer* time than sec. 33 provided for. Giving it this meaning gives a reason for the existence of section 34. To give it the meaning claimed by the respondent is to pronounce it mere surplusage, waste timber.

If I am correct in this holding, then the second order of the learned Chief Justice was properly made and therefore the third was also properly made.

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It seems to me also that the true reading of section 35, in the light of the preceding sections, is that, if all reasonable efforts have been made to serve personally, a Judge has power to make an order for substitutional service after the time limited by the former sections. As, however, I am clear that the second order was properly made, this point need not be further considered.

I have had the advantage of reading the judgment of Mr. Justice Perdue and I quite agree with him that this Court has jurisdiction to hear this appeal.

The appeal is allowed. The costs of this appeal and of the motion before the Chief Justice of the King's Bench to be costs in the cause to the petitioners.

RICHARDS, J.A. Four questions arise here:

Firstly: Does an appeal lie to this Court?

Secondly: Had the learned Chief Justice, whose decision is appealed against, power to make the order of the 18th of July, being the order purporting to grant a second extension of the time for serving the petition?

Thirdly: Had he power after the expiry of the time fixed by the order of 9th July, being the order granting the first extension of such time, to grant the order purporting to allow the petition to be substitutionally served?

Fourthly: Had he, after making the order of 18th of July and that for substitutional service, power to set aside those orders?

As to the first point, I think the decision in *Re Shoal Lake Election*, 5 M.R. 57, is binding on this Court and that we must hold that an appeal does lie.

The second point turns on whether the making of the order of 9th July exhausted the powers of the Judge under sections 33 and 34 of the Manitoba Controverted Elections Act.

In the first place, the Rules of the King's Bench Act do not apply. See Rule 1 of the Act, which says:



"Nothing in these rules shall be construed as intended to affect the practice or procedure \* \* \* upon election petitions."

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We must, therefore, find our code in the Provincial Controverted Elections Act itself, or in rules made under it. There are no rules, that I am aware of, that bear on the questions here to be dealt with. So that we must find our authority in the Act itself.

The Act does not contain any section, similar to section 87 of the Dominion Act, giving a Judge power "to extend, from time to time, the period limited by this Act, for taking any steps or proceedings." In its absence I do not think we can assume that any such power is implied. It seems to me, therefore, that a Judge is limited to such powers as are given him on the face of the Act, or by necessary implication.

Section 33 provides that the petitioner shall cause service to be made within five days after the day on which the petition shall have been presented "or within such further time as a Judge shall order."

That is immediately followed by section 34 which reads:

"Such service may be made within such longer time as any Judge may grant, regard being had to the difficulty of effecting service or to special circumstances."

The question then is: Do the words at the end of section 33 refer to the "longer time" provided by section 34, or do they, in themselves, contain a power to the Judge to grant an extension of the time for service, irrespective of and exercisable before section 34 need be invoked; so that, between the two sections, power is given to a Judge to twice extend the time for service?

I take the word "service," where it occurs in these two sections, to mean personal service.

Section 33 as first enacted (as sec. 35) in 1875, had its end the words, "or within the time prescribed,"

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instead of the words now there, "or within such further time as a Judge shall order." Those words, "or within the time prescribed," in themselves gave no power to a Judge to grant an extension of the time for service. The interpretation clause of the 1875 Act says that "prescribed" means "prescribed by this Act, or by some rule made under this Act." No rule ever was made under that Act, so far as I can ascertain. It seems to me, therefore, that at least until such rules should be made, the words, "or within the time prescribed," could only mean prescribed by the Act. Apart from the earlier part of that section, the only thing prescribed by the Act as to time for service of the petition was what immediately followed in section 36, which was the then equivalent, though with different wording, of the present section 34.

The result, I take it, was that only one extension of time by the Judge was provided by the Act of 1875.

There was no amendment to section 35 of the 1875 Act. But, in the Consolidated Statutes of 1880, it appeared with the present words, "or within such further time as a Judge shall order", substituted for the words, "or within the time prescribed," with which it was first enacted.

Then was the effect of that change to provide a new power of extension, that could be exercised prior to the only one theretofore allowed (under section 36, now section 34), or were the substituted words merely intended to make more distinct what was apparently really intended by those first enacted, that is, that the extension intended to be referred to was that provided by the section which followed?

The Consolidation of 1880 was made pursuant to 41 Victoria, cap. 3 (1878), intituled "An Act to Authorize the Consolidation of the General Statutes of the Province of Manitoba." That Act provided for the appointment



of Commissioners to prepare the intended consolidation. It says in section 5:

"Any alteration may be made in the language of the Consolidated Statutes as may seem requisite by the Commissioners *in order to preserve a uniform mode of expression*, and so as to render any of the provisions thereof simple, clear and precise, but the Commissioners shall in no way whatsoever alter the meaning, nor the spirit, nor the legal effect of any such statutes, or provisions of statutes."

Section 6 of that 1878 Act says that

"The Commissioners may suggest such amendments for the better carrying out of any statute, within the authority of the Legislature, as may seem advisable; and such suggestions shall not be made unless accompanied by a distinct statement of the reasons in support thereof."

The Act 44 Victoria (1881), c. 2, by which the Consolidated Statutes were brought into force, stated them to be so brought "subject to the limitations in the Act 42 Victoria, c. 9, contained."

Section 9 of said chapter 9 is as follows:

"IX. The said Consolidated Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as a declaration of the law as contained in the several enactments and statutes so repealed, and for which the said Consolidated Statutes are substituted."

Search has been made for the Commissioners' report that accompanied the roll, sent by them to the Legislature, of the Consolidated Statutes of 1880. But none can now be found, though apparently one was made. Therefore, if special reasons for the above change were given, they are not now to be found.

In their absence, and finding that, in the ordinary sense of the language, the two sections can be read together (as held by the learned Judge appealed from), as containing only one provision for extension of time, we should I think, assume that the change at the end of

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section 35, now section 33, was made pursuant to section 5 of the 1878 Act, "to preserve a uniform mode of expression and so as to render" the "provisions" of sections 35 and 36 (now 33 and 34), "simple, clear and precise," and that it was not intended to, in effect, insert, between the then sections 35 and 36, an entirely new power to the Judge, which would, contrary to such section 5, "alter the legal effect" of section 35 (now 33).

If the Legislature had intended, by the 1880 consolidation, to change the Act by providing for further extensions beyond the one previously allowed, it seems strange that they should have limited it to only one further extension, which, I take it, would still be the effect of the Act if the appellants' contention is correct. When the original Act was passed in 1875 there was in The Dominion Controverted Elections Act, 1874, a section as follows:

"43. The Judge shall, upon sufficient cause being shown, have power upon the application of any of the parties to a petition, to extend from time to time the period limited by this Act for taking any steps or proceedings by such party."

That section remained in force till the 1886 consolidation of the Statutes of Canada and was there re-enacted as section 64. It appears in the present Dominion Act as section 87, under which heading I have already referred to it.

The Dominion Act of 1874 was known to the Manitoba Legislature when they passed the Act of 1875. A comparison of language makes me think that it must have served, in part, as a precedent for the drafting of that Act of 1875. It was also known to the Commissioners, and to the Legislature, when the Consolidation of 1880 was prepared, and when it was made law. One would expect that, if the intention had been to give power to make more than one extension of the time for service (as must be contended to support the appellants'

present contention), a similar section to that above quoted would have been introduced into the Provincial Act.

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Further, if these sections under consideration provide for two extensions, there is the curious result that, though the second one—that in the present section 34—is limited by the provision that, in making it, the Judge is to have regard “to the difficulty of effecting service” (that is to say, personal service), “or to special circumstances,” and apparently, therefore, not to grant the extension unless such difficulty or special circumstances exist, he may grant the first extension without regard to such matters, as section 33, on its face, contains no such limitation.

I take the law to be that, in construing controverted elections Acts, a strict construction must be put upon their provisions, as they are a delegation by the Legislatures of their own powers.

With some hesitation, I am of the opinion that the decision appealed from was correct on this point, and that the learned Judge had no jurisdiction to make the order of 18th July.

Then, thirdly, was there power to make the order for substitutional service after the time limited by the first order, that of 9th July, had expired?

Section 37 of the Act of 1875 (now section 35) says: “If the respondent or respondents can not be served personally, or at their domicile, *within the time granted by the Judge*, the service may be effected upon such other person, or in such other manner, as the Judge, on the application of the petitioner, may appoint.”

No change was made in the above till the consolidation of 1880. There it appeared in the form in which it now exists as section 35. The words, “within the time granted by the Judge,” had been omitted, and the words

1913      "the Judge," where they last occur, had been changed to  
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RICHARDS,      I see nothing in the substitution of "any" for "the."  
J.A.      But the omission (which we must presume to have been intentional) of "within the time granted by the Judge" does seem to me to necessarily change the legal effect of the section. If it now read as it originally stood, I think that, though the Judge had not power to make the order of 18th July, he would probably have still had power (under section 35), during, or after, the period granted by the order of 9th July, to order that the service might be made substitutionally.

I say he would have had that power during that period on the authority of the *West Peterborough* case, 41 S.C.R. 410, where, although section 18, s-s. 2, of the Dominion Controverted Elections Act says that, if service cannot be effected "within the time granted by the Court", an order for substitutional service can be made, an order, both extending the time and providing for substitutional service, was made on the day after the expiry of the ten days allowed for personal service after the filing of the petition. It was the first and only order extending the time. It was held that the provision for substitutional service was properly included in that order.

Now, what conclusion is to be drawn from the omission of these words, "within the time granted by the Judge?" Their omission cannot, like the change in section 35 (now 33), be read as intended "to preserve a uniform mode of expression," or "to render any of the provisions" of the section "simple, clear and precise." It was an alteration "in the meaning" and "legal effect" of the section—an omission of an important part—and I can only assume that it was intended to curtail the effect of the section by limiting the period within which substitutional service might be allowed, by the same or some other Judge, to the one period during which an extension

of the time for service might be granted under the preceding section. Its omission could be for no other purpose that I can see.

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It was argued that the intention of section 35 is that it was not until the expiry of the five days allowed by section 33, and of such further time as might be given by a Judge under sections 33 and 34, that the powers under section 35 could be exercised. But that contention is negatived by the *West Peterborough case* referred to above and seems to me untenable in view of the above alteration in the section.

If I am right in my view of the meaning of section 35, then, after the time allowed by the order of 9th July had expired, the learned Judge had no jurisdiction to grant the order for substitutional service.

Then, having made the orders in question, had he power to set them aside?

The powers at one time freely exercised by Judges, at least in Equity, to set aside their own decisions, have been largely restricted by later decisions on the ground that, in so acting, Judges have, in effect, dealt with appeals from their own judgments. But the same consideration does not, apparently, apply to interlocutory orders.

In *Mullins v. Howell*, 11 Ch.D. at p. 766, Sir George Jessel says:

"The Court has a jurisdiction over its own orders, and there is a larger discretion as to orders made on interlocutory applications than as to those which are final judgments."

In *Ainsworth v. Wilding*, [1896] 1 Ch., Romer, J., at foot of p. 678, after pointing out that, in a case he was referring to, the question had been one of dealing with a final judgment, says:

"*Mullins v. Howell* \* \* \* was a case of an order made on an interlocutory application, and that was the

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very ground taken by Sir G. Jessel for entertaining the jurisdiction to discharge the order."

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In *Neale v. Gordon Lennox*, [1902] 1 K.B. at 844, Lord Alverstone says:

"In my judgment \* \* \* there is a broad distinction between interlocutory and final orders. This distinction has often been pointed out: see the judgment of Jessel, M.R., in *Mullins v. Howell*, and also the judgment of Romer, J., in *Ainsworth v. Wilding*."

The order appealed from was not a final disposal of the petition and the cases of *Re St. Nazaire Co.*, 12 Ch.D. 88, and *Preston v. Allsup*, [1895] 1 Ch. 141, in which the orders under consideration were final disposals of the cases, do not seem to me to be in point.

The two orders, which the learned Chief Justice purported to set aside, were made *ex parte*.

As stated above, the rules of the King's Bench Act do not, in my opinion, apply in this case. But they may, perhaps, be referred to, as shewing how *ex parte* orders are there dealt with. If they did apply here, then, reading rules 430 and 438, the learned Judge would clearly have the power to make the setting aside order that he did, and which is now appealed against.

It would be an extraordinary thing if a Judge, who finds he had no jurisdiction to make an order which he had purported to make, should have no power to set that order aside. The learned Chief Justice held that he had not had the jurisdiction, in this case, to make the order of 18th July and that for substitutional service, and it seems to me that he rightly so held. That being the case, I cannot doubt his power to make the order rescinding them which is appealed from.

I would dismiss the appeal.

PERDUE, J.A. The respondent raises the point that the petitioner has no right to appeal to this Court from the order in question. The only appeal specially men-



tioned in the Act is that for which provision is made in sections 101-104, and that, it is claimed, is confined to an appeal from the decision rendered upon the trial of the petition. The point now raised came up in *Re Shoal Lake Election*, 5 M.R. 57, where it was claimed that no appeal lay from an order disposing of the preliminary objections, on the ground that the Act made no provision for an appeal from such an order. The Full Court *in banc* consisting of Wallbridge, C.J., Taylor and Killam, JJ., unanimously decided that an appeal lay from the order. It was held that the powers given to a Judge of the Court by the Act must be deemed to have been given subject to the usual jurisdiction of the Court to review an interlocutory order in a cause in Court. Since *Re Shoal Lake* was decided, the present King's Bench Act was passed. Section 58 of that Act declares that "every rule, order, verdict, judgment, decree or decision made, given, rendered or pronounced by a Judge of the Court may be set aside, varied, amended or discharged on appeal, upon notice, by the Court *in banc*." This action was passed by the same legislative authority which passed the Controverted Elections Act and the plain intention is that the section should have general application to all judicial acts of any Judge of the Court sitting as such. This section confirms the view taken by the Court in the *Shoal Lake* case. That decision has never been disturbed in so far as my knowledge goes, and it has always, I think, been regarded as a binding authority.

A further objection was raised that the Court of Appeal had not the powers in this regard of the Court of King's Bench sitting *in banc*, but section 7 of the Court of Appeal Act, 5 & 6 Ed. VII, c. 18, completely disposes of the objection. That section enacts that, "after the coming into force of this Act the Court of Appeal shall be vested with and shall exercise all the rights, powers and duties heretofore held, exercised and enjoyed under

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and by virtue of 'The King's Bench Act' or any other statute of this Province or of the Dominion of Canada by the Court of King's Bench sitting *in banc* and as a Court of Appeal from the judgment, decision, order or decree of a single Judge," etc. The same section also provides that, after the coming into force of the Court of Appeal Act, the appellate jurisdiction of the Court of King's Bench should cease. I have no hesitation in holding that an appeal lies to this Court from any order or decision of a single Judge made or pronounced under any powers conferred on him by the Manitoba Controverted Elections Act.

Granting then that there is an appeal to this Court, the first point to be considered is, what power, if any, had the learned Chief Justice to set aside the two orders already made by him. Neither the Controverted Elections Act nor the rules made thereunder give him any such power. Both rules and Act are silent upon that point. If, therefore, he possessed the authority to reverse his own order, that authority must have been acquired as part of the powers possessed by him in the capacity of a Judge of the Court of King's Bench.

It has been repeatedly held by the Court of Appeal in England, as well as by other authority, that, under the system of procedure established by the Judicature Acts (upon which our King's Bench Act is founded), a Judge of the Court has no jurisdiction to re-hear an order which has been pronounced, drawn up, signed and completed, whether the order was made by himself or by any other Judge. The power to re-hear has become part of the appellate jurisdiction transferred to the Court of Appeal.

The following cases fully support this view: *In re St. Nazaire Company*, 12 Ch.D. 88; *Preston Banking Co. v. Allsup*, [1895] 1 Ch. 141; *Charles Bright & Co. v. Sellar*, [1904] 1 K.B. 6.



All of these were decisions of the Court of Appeal. In *Preston Banking Co. v. Allsup*, Lord Halsbury said: "Even when an order has been obtained by fraud, it has been held that the Court has no jurisdiction to re-hear it. If such a jurisdiction existed it would be most mischievous. The fact that in the present case the application to rehear is made to the particular Judge who made the order is immaterial; for, if one Judge can re-hear the order, another can. Any application which may be made to the Vice-Chancellor for an order in the nature of a supplemental order is, of course, still within his jurisdiction; but he has no jurisdiction to re-hear or alter this order."

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The same principle has been adopted in our own Courts, See *Munroe v. Heubach*, 18 M.R. 547. I should, however, prefer to deal with the present case as if it were an appeal brought by the respondent against the orders of 18th July and 24th July, so that the actual questions in dispute as to the validity of these orders might be disposed of on the present appeal.

The provisions of the Controverted Elections Act relating to the service of the petition and notice of presentation thereof are contained in sections 33-36 inclusive.

These sections first appeared in the consolidation made in 1880. The first Act passed in 1874 contained provisions relating to the service of the petition differing substantially from the present ones.

By section 33 the service is to be made within five days "or within such *further time as a Judge shall order*." Then follows section 34 which declares that the service may be made "within such *longer time as any Judge may grant*, regard being had to the difficulty of effecting service or to special circumstances." The wording of section 34, where the expressions "longer time," "any Judge" and "may grant" are used, instead of "further time," "a Judge" and "shall order," which

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are found in section 33, appears to me to have been adopted to show that section 34 confers a power upon a Judge different from and additional to what had been already provided by section 33.

Section 35 enables the petitioner to obtain an order for substitutional service in case the respondent cannot be served personally. Section 36 speaks of "the services required by the three next preceding sections," indicating that they are distinct provisions.

I think the meaning of these sections is:

(1) Under section 33 the petition and notice of presentation are to be personally served on the respondent within five days, or such further time as a Judge may order, without any special circumstances or difficulty in effecting service being disclosed.

(2) Under section 34 the personal service on the respondent is to be made within the longer time that may be granted by any Judge (not necessarily the one first applied to under section 33), on being shown the difficulty of effecting service or the existence of special circumstances.

(3) If personal service cannot be effected, then any Judge may, on the application of the petitioner and on proof of the necessary facts, direct substitutional service.

If both sections 33 and 34 refer to the same extension of time and to one extension only, I cannot conceive why two distinct sections were drawn up and a wording adopted in section 34 differing from that in section 33, when the intention, if it were such, might have been succinctly and clearly expressed by simply adding, at the end of section 33, the last clause of section 34, namely, "regard being had to the difficulty of effecting service or to special circumstances."

I think it is clear that the two sections refer to two different conditions and that the true intention is that,

after an order has been granted under section 33, the same Judge or another Judge of the Court may grant additional time for service under section 34, on special circumstances being shown.

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Taking that view of the Act, the second order extending the time was properly made.

But, even supposing that sections 33 and 34 should be read together and that they both refer to one and the same extension of time, must the order for substitutional service be made within the time limited by such extension? Mathers, C.J., answers this question in the affirmative. He says: "Under sections 33 and 34 the time within which the petition must be served is fixed. Section 35 only provides for an alternative mode of service if personal service cannot be effected. But whether the service be personal or otherwise, it must be made within the time fixed under sections 33 and 34."

If the view taken by the learned Chief Justice of the King's Bench is correct, an election petition under the Act might be completely defeated and rendered null and void by a Judge failing to give sufficient time for service in the first instance. The petitioner might not succeed in making the service within the time granted, although he used every effort to do so and exercised the utmost diligence. He might be unable during that time to prove that the respondent was evading service or to show other grounds upon which substitutional service might be granted. Thus the time limited might elapse without personal service being made and without an order for substitutional service being obtained. The Judges of the Court would then, if the above view be correct, be powerless either to extend the time or to grant substitutional service. I cannot believe that that was the intention of the Act.

It is true that, under rules 12 and 13 passed by the Judges of the Court of King's Bench in pursuance of the Act, provision is made by which a Judge can, if the

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respondent has been evading service, order that what has been done should, in certain cases referred to in the rules, be considered sufficient service. But the Judges have no power to pass a rule which is inconsistent with the Act. If, therefore, the intention of rules 12 and 13 is to confer power upon a Judge to declare, after the time for service has elapsed, that certain things which happened during the currency of that time should be deemed to be service of the petition, a grave question might arise as to the power to pass such rules, assuming that the interpretation placed upon the sections by Mathers, C.J., to be correct. These rules would, in effect, confer power on a Judge to revive a petition which was virtually dead.

There is the further important consideration that, if sections 33 and 34 give a Judge power to order only one extension of time in which to make the service, so that after making that one order his power to extend the time is gone, then he would have no power to further extend the time for the purpose of making the substitutional service authorized under section 35, unless we regard that section as a separate and distinct provision giving new powers in the new circumstances of the case, and enabling a Judge to order substitutional service after the time limited under sections 33 and 34 had expired.

I think we must regard section 35 as a provision separate and distinct from sections 33 and 34. Section 35 was, in my view, passed for the purpose of enabling a Judge to order substitutional service upon the respondent, where the petitioner could not effect the personal service referred to in the two preceding sections. This must imply a power to order substitutional service even after the whole time allowed for making personal service has been consumed in ineffectual efforts to make such personal service.

I think the appeal should be allowed, the order dated

20th August, 1913, set aside and the orders of 18th and 24th July, 1913, restored. The costs of this appeal and of the motion before Mathers, C.J., to set aside the orders should be costs in the cause to the petitioner.

CAMERON, J.A. This is an appeal from an order made August 20, 1913, by Chief Justice Mathers setting aside a previous order made by him July 18, 1913, extending the time for service of the petition herein and a further order made July 24, 1913, for substitutional service of the petition.

The point is taken that no appeal lies from the order of August 20, which, it is contended, is, therefore, final. It is argued that the provisions of the Controverted Elections Act, cap. 34, R.S.M. 1902, do not expressly authorize such an appeal and that therefore the jurisdiction cannot be presumed; that the appeal, expressly given by section 101, is limited to decisions at trials and does not extend to interlocutory matters, or it would have been so enacted, and that this application to review the order of a Judge of the King's Bench is an attempted exercise of an authority on the part of this Court not warranted by the Act constituting it.

We find that appeals from the decision of a single Judge in election proceedings have been entertained for a considerable period. In *Re Shoal Lake Election*, decided in 1887; 5 M.R. 57, it was held that an appeal lay against an order by a single Judge allowing preliminary objections, although the Act as it then stood did not provide for an appeal in express words. "The authority given to a Judge to hear and determine questions raised on preliminary objections must be deemed to be given subject to the usual jurisdiction of the Court to review an interlocutory order in a cause in Court," per Killam, J., at p. 61, who, in support of this statement, cites numerous authorities, amongst which I refer particularly to a decision of Harrison, C.J., in *Kidd v.*

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J.A. O'Connor, 43 U.C.R. 198. In *Re Cypress Election*, 8 M.R. 581, an appeal from an order of Mr. Justice Killam allowing preliminary objections was entertained and dismissed, and the question of jurisdiction was not, apparently, raised. In *Re Brandon*, 9 M.R. 511 (1894), the preliminary objections were overruled by Mr. Justice Bain, whose order was upheld by the Full Court. Mr. Justice Taylor, however, in a lengthy judgment, held with the appellants and would have allowed the appeal. But nowhere in his judgment or elsewhere does it appear that the jurisdiction of the Court was called in question.

These cases were decided prior to the Queen's Bench Act, 1895, where we find the following section (now 58):

"Save as provided in the next preceding section, every rule, order, verdict, judgment, decree or decision, made, given, rendered or pronounced by a Judge of the Court may be set aside, varied, amended or discharged on appeal, upon notice, by the Court *in banc*."

I refer also to sections 92, 93 and 94 of the Act. These provisions can surely be construed in no other way than as making it clear beyond any possible doubt that, in the case of an order in an interlocutory matter in an election proceeding in Court, such an order can be varied, amended, set aside and discharged by the Court *in banc*. That was the settled law before the King's Bench Act, and it is impossible to question it now.

But it is submitted that this Court does not possess all the powers of the Court of King's Bench *in banc*, one of which was the authority to review and, in a proper case, to reverse the order of a Judge of that Court. The jurisdiction of this Court, it is argued, is purely statutory and cannot be extended to include powers not expressly conferred, of which the authority to review a judgment or order of a judge of the King's Bench on an interlocutory matter is not one.

Section 5 of the Controverted Elections Act provides

that "His Majesty's Court of King's Bench for Manitoba shall have jurisdiction over election petitions and over all proceedings to be had in relation thereto, subject, nevertheless, to the provisions of this Act." The general jurisdiction of the Court of King's Bench is defined by sections 23 and 24 of the King's Bench Act. By section 7 of The Court of Appeal Act, 5-6 Ed. VII, c. 18, the Court of Appeal is vested with all the rights, powers, and duties theretofore exercised by the Court of King's Bench sitting *in banc* and as a Court of Appeal from the judgment, order or decision of a single Judge and the Court of King's Bench thereupon ceased to have any appellate jurisdiction. In view of these sweeping provisions, to my mind the conclusion is plain that, whatever powers of review the Court of King's Bench had in respect of an order made by a Judge of that Court, those powers have been transferred to and are now vested in this Court. I have no doubt, therefore, that this Court is competent to entertain this appeal.

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The next question presented for discussion is that of the authority of the learned Chief Justice to rescind his own orders. In England it is now held that a Judge of the High Court has no power to re-hear an order made by himself or any other Judge after the order has been drawn up: *Annual Practice*, 1912, p. 1204; *Re St. Nazaire Co.*, 12 Ch.D.; *Preston v. Allsup* [1895], 1 Ch. 141. It was pointed out that orders made *ex parte* were an exception to this rule and reference was made to the decision in *Shaw v. Nickerson*, 7 U.C.R. 541, cited in *Kidd v. O'Connor*, 43 U.C.R. 200. But in *McNabb v. Oppenheimer*, 11 P.R. 214, Mr. Justice Rose examined those authorities and held that he had no jurisdiction to re-consider or rescind his own order. See also *Robertson & Coulton*, 9 P.R. 16, and *Munroe v. Heubach*, 18 M.R. 547. Certain it is that no such express authority is given the Judge by the Controverted Elections Act. And it

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would also appear that the sole authority to set aside and discharge an order made by a Judge is now vested in the Court of Appeal. But this whole matter is now before us, and an extension of time could be granted if necessary to enable us to deal with it as if an appeal had been duly taken.

Sections 33 and 34 of the Controverted Elections Act read as follows:

“33. The petitioner shall cause each respondent to be served with a copy of the petition and a notice of the presentation thereof, within five days after the day on which the petition shall have been presented, or within such further time as a Judge shall order.”

“34. Such service may be made within such longer time as any Judge may grant, regard being had to the difficulty of effecting service or to special circumstances.”

We are asked to read section 34 as if it merely reiterated, in other words, the concluding words of section 33. On such construction section 34 becomes superfluous and is inserted without an object. But the wording of section 34 differs in obvious particulars from that of the concluding part of section 33, and it is to be presumed that the Legislature had an object in enacting section 34 separately. Section 33 provides for service within five days after the presentation or such additional time to that as a Judge might grant on an application, which might, under circumstances readily conceivable, be made before the lapse of the five days, or which might be made thereafter. But that extension might prove inadequate and section 34 gives “any Judge” of the Court power to extend the time for a further period than already granted. In an application coming under section 34, “any Judge” considering the same is to have regard for the difficulty of effecting service or any special circumstances that may be shown. This seems to me a fair and reasonable construction to place on these two sections. It cannot surely be assumed that the Legislature’s intention was merely to



repeat in section 34 what it had already said in section 33. The true intention of the Legislature, I take it, was to make adequate provision for the service of the petition on the respondent and this intention might not be effectually carried out if we reject section 34 as meaningless and give to section 33 the narrow construction that it authorizes one order of extension and no more. An examination of the sections of the statute in question in *Power v. Griffin*, 33 S.C.R. 39, shows, in my opinion, that that case is not applicable here.

I am, therefore, of the opinion that the order of the Chief Justice of July 18th, subsequently set aside by him, was validly made and ought to be restored.

Section 35 of the Act says:

"35. If the respondent or respondents cannot be served personally or at their domicile, the service may be effected upon such other person or in such other manner as any Judge, on the application of the petitioner, may appoint."

It follows that, if the order of July 18th was valid, the order for substitutional service must stand. Apart from that, on the best consideration I have given this section, it appears to me that it authorizes any Judge to make an order effecting service upon some other person or in some other manner for the petitioner, upon a proper case being made, and the application for such order might be made before or after the lapse of the time fixed for service. There is no restriction in the section and it might well happen that an application could properly be made, and ought in certain circumstances to be made, before the lapse of the time. The section is wide enough to cover either case and that, it seems to me, was the intention.

In my judgment the appeal must be allowed.

HAGGART, J.A. I do not think that the members of the Legislature individually, or collectively, intended that

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their tenure of office should be more uncertain, or that their seats should be more assailable, than is expressed in the very words of the statute. The Legislature is divesting itself of certain inherent powers, creating a tribunal, and enacting a code. This tribunal has no powers not expressly given to it by the Act. The code is complete and cannot be extended by inference. With all due respect, I do not think the Legislature intended to facilitate the proceedings of those dissatisfied with the result of an election and claiming their seats.

I agree with the strict interpretation given to the different sections in question by the Chief Justice of the King's Bench and would not disturb the disposition of the case made by him.

I have read carefully the reasons of my Brother Richards who has traced the different changes in the Legislation since 1874, and has pointed out the difference in the wording of the Dominion Act. I concur with him in his conclusions and would dismiss the appeal.

*Appeal allowed.*

## TOCHER V. THOMPSON.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*Warranty—Collateral verbal agreement—Evidence—Lease of traction engine—Representation amounting to warranty.*

1. Parol evidence may be given to show that at the time of the execution of a written lease of land, and a traction engine and plowing outfit to be used in cultivating the land, the lessor represented to the lessee that the traction engine was in good working order, although the lease itself contained no such statement or any warranty to that effect.

*Morgan v. Griffith*, (1871) L.R. 6 Ex. 70; *Erschine v. Adeane*, (1873) L.R. 8 Ch. 756; *Angell v. Duke*, (1875) L.R. 10 Q.B. 174, and *De Lassalle v. Guildford*, [1901] 2 K.B. 215, followed.

2. When such evidence shows that the representation so made was intended to be a warranty, it should be treated as such, and when it was an assertion of a fact as to which the lessor had special knowledge and the lessee had no knowledge or means of knowledge, and the lessee entered into the lease on the faith of the truth of the assertion, it should be held that it was intended to be a warranty and to confer upon the lessee a right of action for any breach of such warranty. Opinion of Lord Moulton in *Heilbut v. Buckleton*, [1913] A.C. at p. 50, criticizing judgment of A. L. Smith, L.J., in *De Lassalle v. Guildford*, referred to.

3. There may be a binding verbal warranty entered into at the time of the execution of a written contract, provided it contradicts no term in the writing and is collateral to it, not in the sense of being subsidiary, but of being independent of, and not inconsistent with, it.

ARGUED: 25th November, 1913.

DECIDED: 8th December, 1913.

THE plaintiff brought this action for damages for Statement.  
breach of a covenant contained in a lease and for breach  
of an alleged warranty with regard to a traction engine.

Both the plaintiff and defendant were farmers residing at Miniota. In January, 1912, plaintiff leased defendant's farm, stock and implements. The lease contained a clause that in addition to the implements the plaintiff was to have the use of a traction engine and a threshing outfit. In addition to the lease there was a verbal agreement as to the profits for threshing done for other people. The lease also contained a clause that the implements at the

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time of the plaintiff taking same over were in good working order and that he was to return them in like good order. The traction engine was not in good working order and on this the plaintiff based his claim for breach of warranty. The defendant denied the warranty.

The case was tried at Minnedosa before Galt, J., who entered a verdict for the plaintiff on some counts and for the defendant on others.

Defendant appealed as to those issues which were against him.

*H. F. Maulson* and *L. St. G. Stubbs* for defendant, appellant, cited *De Lassalle v. Guildford*, [1901] 2 K.B. 215.

*S. H. McKay* for plaintiff, respondent.

The judgment of the Court was delivered by

CAMERON, J.A. The lease here in question contains the following provision:

"In addition to the implements, etc., referred to in the schedule attached hereto, the lessor grants to the lessee the use of his traction engine and plowing outfit, for all plowing done on the land excepting breaking, as herein-after mentioned, the lessee shall maintain and upkeep the said engine; and with regard to breaking new land the lessor agrees and undertakes to pay to the lessee the one-half of the cost of the gasoline utilized for the breaking."

Without entering upon the question whether a warranty can here be implied in law, it is urged that there is evidence of an express warranty on the subject of fitness of the traction engine mentioned. The learned trial Judge appears to have found this in the contract, but it seems to me that the provision as to the letting of the use of the traction engine and plowing outfit, for all plowing done on the land except breaking as mentioned in the lease, is treated as a special matter, and stands

outside the antecedent general term that the whole implements are taken over in good working order.

But there appears to be evidence supporting the assertion that there was, *de hors* the document and collateral to it, a warranty or condition that the engine was in good working order. This the plaintiff states plainly at p. 18. The plaintiff saw the engine before the lease was executed. "I asked him (the defendant) if it was in good working order, and he said: 'Yes, you have nothing to do but to flop the fly wheel and away she goes.' That is what he said." The importance of the engine as a factor in the transaction is shewn by the plaintiff at p. 31. If he had had the engine in good working order he would have been able to put in the 100 acres of flax which, it would seem, was in contemplation at the time he executed the lease. The plaintiff's story is corroborated to some extent by the evidence of Douglas Tocher, pp. 58 and 59. The defendant knew it was anticipated that flax should be sown on some portions of the land, p. 83. It is true that the defendant denies that he warranted the engine in any particular, p. 100, but at p. 101 in answer to the question, "I suppose you were quite justified in saying it (the engine) was working all right," he answered, "I told him it was working all right": and further, to the question, "I am asking you what you said to Tocher. Did you tell him it was working all right in the fall of 1911?", he answered, "I might have." "And represented it would do the work he wanted it to do in 1912?" to which he answered, "I simply told him what the Company told me." The defendant disclaimed any intention of giving the plaintiff a plowing outfit "that was not any good."

It is to be borne in mind that the plaintiff was taking over under the lease two and a quarter sections of land—an area (partly unbroken) demanding a large force of

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horses or considerable motive power for its cultivation, and there were not sufficient horses there to do the work.

When the engine was discovered to be unworkable, the defendant gave some days of his time in attempting to put it in order, but without success, and finally went to Winnipeg to secure the services of an expert who, after trying several days, also failed and a new engine was sent forward arriving July 14, too late for the season of 1912. It seems to me these acts of the defendant throw some light on the view he then took of the transaction.

Upon consideration of the whole evidence, so far as it concerns this branch of the case, I take it as established that the defendant, during the time of the bargaining leading up to the written contract, in substance made the assertions that the engine was in good working order and that this affirmation induced the contract.

The assertion, therefore, seems to me to come within the old definition given by Holt, C.J., that "An affirmation at the time of the sale is a warranty, provided that it appears on the evidence to be so intended." In *Heilbut v. Buckleton*, [1913] A.C. 30, the affirmation or assertion there in question was held not to have been intended as a warranty. We find in that case a criticism of a passage in the well known case of *De Lassalle v. Guildford*, [1901] K.B. 215, where it was held that, "In determining whether it (the representation) was so intended (i.e. as a warranty) a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge and on which the buyer may be expected also to have an opinion, and to exercise his judgment," per A. L. Smith, M.R. at p. 221, quoting from *Benjamin on Sale*, p. 659. "The use of the term 'decisive test,'" Lord Moulton says at p. 50, "cannot be defended, but the features referred

to may be 'criteria of value' in coming to a decision whether or not a warranty was intended." "The intention of the parties can only be deduced from the totality of the evidence, and no secondary principles of such a kind can be universally true."

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Accepting as the fact (as I think we must) that the representation was here made as the plaintiff asserts, and in the circumstances disclosed, I think it follows it was the intention that it should be a warranty. That is my view, as stated, on a consideration of the whole evidence bearing on this point. Applying the features brought out by A. L. Smith, M.R., in the above quoted and criticized passage, as "criteria of value" in arriving at a decision, it must be said that the defendant was not merely asserting an opinion upon which he had no special knowledge, for this he clearly had, and it was not a matter on which the plaintiff might reasonably be expected to have an opinion and exercise his judgment, for the plaintiff was a farmer, not a mechanic, and was not familiar with the construction and operation of gasoline engines in general or of this one in particular.

This lease did not cover the whole ground of the contract and did not contain all its terms. There is nothing in it as to the condition of the engine and plowing outfit, though its proper condition was a matter that was most important, if not essential, to the making of the lease and, in fact, induced it. The case, therefore, seems to come within the decisions wherein parol collateral agreements outside written documents have been allowed in evidence and given effect to by the Courts: viz., *Morgan v. Griffith*, L.R. 6 Ex. 70; *Erskine v. Adeane*, L.R. 8 A.C. 756; *Angell v. Duke*, L.R. 10 Q.B. 174, and *De Lassalle v. Guildford*, [1901] 2 K.B. 215, which, on this question, is not at all affected but rather confirmed by *Heilbut v. Buckleton*, *supra*.

In my opinion, therefore, the plaintiff has established

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here an affirmation intended as a warranty that the traction engine was in working order. This warranty contradicts no term of the written document, but is collateral to it, not in the sense of being subsidiary, but of being independent of, and not inconsistent with, it. It would be impossible in the circumstances to give the representation the effect of *simplex commendatio*. It was a positive affirmation intended by the defendant to operate as a warranty, and was acted on as such.

With regard to that part of the appeal directed against the portion of the learned Judge's judgment relating to the threshing agreement of 1912, I am of opinion the appellants also fails.

I think the whole appeal must be dismissed with costs.

*Appeal dismissed.*

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### COURT OF APPEAL.

#### HOOPER V. BEAIRSTO PLUMBING CO.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*Employer and workman—Injury to workman—Liability of employer  
for—Duty to provide proper and safe appliances to work with—Common  
employment—Volenti non fit injuria.*

The infant plaintiff, a boy of 16 years, in the employ of the defendant company, was, in obedience to the directions of one of the plumbers employed by the company, holding a chisel in a vertical position over a concrete floor, his head being nearly on a level with the top of the chisel, whilst a laborer temporarily taking the place of the plumber was driving the chisel into the concrete by successive blows of a sledge hammer upon the top of the chisel in order to break into the concrete.

At one of these blows the plaintiff was struck in the eye by a steel splinter from the head of the chisel and lost his eye in consequence. An examination of the chisel showed that its head was much battered and broken up, evidently by long continued beating upon it with a sledge hammer, and its appearance was such as to suggest the probability of splinters being knocked off by any blow of the hammer.



The chisel was one which had been borrowed by the plumber, who had to provide his own tools to work with.

*Held*, 1. That it is the duty of the employer at common law to provide proper appliances for his workman to work with and to maintain them in a proper condition: *Smith v. Baker*, [1891] A.C., per Lord Herschell at p. 362, that, if by reason of a breach of that duty a workman suffers injury, the employer is *prima facie* liable: *Williams v. Birmingham*, [1899] 2 Q.B. 338, and that proper appliances in a proper condition had not been provided in this case.

2. As between the defendants and the plaintiff, it was no defence that the defendants did not supply the defective chisel but left the plumber to provide it.

*Jones v. Burford*, (1884) 1 T.L.R. 137, distinguished.

3. As the plaintiff had never been put to that kind of work before, and did not know the dangerous character of it, the maxim "*volenti non fit injuria*" could not be applied to the circumstances of this case.

*Per* HAGGART, J.A., dissenting. The utmost that could be said of the use of the defective chisel was that it was a specific act of negligence on the part of a fellow workman, causing an injury to another in the common employment of the defendant company, but giving rise to no right of action at Common Law.

*Hastings v. Le Roi*, (No. 2) (1903) 34 S.C.R. 177, followed.

Even if the manager of the company, Bearisto, who looked after all the defendants' work, saw that it was carried out and employed all the men that worked for the company, had actual knowledge of, approved of, adopted and ratified what the plumber was doing in that particular work, that would not be binding on the company, as, whatever his powers and duties might be, he was, as manager, only a fellow workman with the humblest laborer or apprentice in the employ of the company, although he might be in practical control of the company and own ninety per cent or more of its capital stock.

*Wilson v. Merry*, (1868) L.R. 1 H.L.Sc. at p. 334; *Howells v. Landore, &c. Co.*, (1874) L.R. 10 Q.B. at p. 64, and *Matthews v. Hamilton Powder Co.*, (1887) 14 A.R. 261, followed.

ARGUED: 24th October, 1913.

DECIDED: 8th December, 1913.

THE plaintiff was an apprentice plumber, working for the defendants, an incorporated company, and whose business was that of plumbing. He was sent in charge of a capable master plumber, named Arkell, to make some changes in the plumbing in a hotel. To get access to the plumbing already there so as to carry out part of these changes, a large mass of concrete had to be broken.

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Statement. Arkell got the plaintiff to telephone to the defendant company to have laborers sent to break this. On hearing that laborers would not be sent, Arkell sent the plaintiff to another building, to get proper tools with which to break the concrete. These tools were not got, for some reason, and Arkell then undertook to break the concrete by using a long drill, or cold chisel, which he had borrowed from another plumber. The plaintiff was ordered by Arkell to hold the drill while Arkell struck it with a heavy sledge hammer, to drill certain holes which were necessary in order to make the required breaking. So long as Arkell handled the sledge hammer no harm happened; but, one morning, Arkell gave the handling of the sledge to a laborer, not in the employment of the defendant but in that of the hotel people, and whom they furnished for the purpose of enabling the job to be done more cheaply. There is no evidence whatever that this laborer was skilled in the handling of the sledge. Very shortly after he began to use it, a fragment flew from the upper end of the drill, or chisel, and lodged in the plaintiff's eye. The result was that he lost the eye.

This action was brought for damages for the injury. Macdonald, J., held that the appearance of the chisel was such as to convince him that it was an improper tool to be used, and gave judgment for the plaintiff.

Defendants appealed.

*R. M. Dennistoun, K.C.*, and *E. Anderson, K.C.*, for defendants, appellants, cited *Phalen v. G.T.P.*, 23 M.R. 435; *Jones v. Burford*, 1 T.L.R. 137; *Rostrum v. C.N.R.*, 22 M.R. 250; *Kessowji v. Great Indian, &c., Ry. Co.*, 96 L.T. 859; *Cribb v. Kynoch*, [1907] 2 K.B. 548; *Brooks v. Fakkema*, 44 S.C.R. 415; *Young v. Hoffmann*, [1907] 2 K.B. 646; *Wilson v. Merry*, L.R. 1 Sc. App. 326; *Howells v. Landore*, L.R. 10 Q.B. 62, and *Anderson v. C.N.R.*, 21 M.R. 121, 45 S.C.R. 355.

*H. J. Symington* for plaintiff, respondent, cited *Crocker v. Banks*, 4 T.L.R. 324; *Drolet v. Metabetchouan*, Q.R. 26 S.C. 307; *Union Card Co. v. Hickman*, 4 E.L.R. 125, and *Allan v. Sawyer-Massey Co.* 12 O.L.R. 282. 1913  
Argument.

RICHARDS, J.A.: There is evidence both ways as to whether the breaking of concrete was a proper part of a plumber's work, such as an apprentice should be put at by his master. It certainly is not, in itself, plumbing, and the fact that Arkell asked for laborers to do the work would support the contention that it is not part of a plumber's work. It is the duty of a master to provide his workmen with a safe place to work in, proper tools with which to do the work, and a proper system of working. It is argued that the chisel in this case was not provided by the defendants, but was borrowed by Arkell, and that, if there was any negligence, it was that of the plaintiff's fellow servant, and that therefore no action lay at common law.

The evidence shows that it is the custom among plumbers that the journeyman plumber furnishes his own tools, and if the injury had happened to Arkell that might perhaps be a defence to an action by him; but, as regards the plaintiff, I do not think it would be any defence. As between the plaintiff and the defendants, it was still their duty to see that such tools as he worked with were proper tools. He was their apprentice, and there was no suggestion that it is the custom for an apprentice to furnish his own tools. That distinguishes this case from *Jones v. Burford*, 1 T.L.R. 137, in which, though the master had provided ladders for work, the injury resulted from the use of a dangerous ladder procured by a fellow servant of the person injured, and upon which the plaintiff was working when injured. In that case the master had discharged his duty by providing ladders. In the present case, it seems to me, he

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took the risk, as between him and the plaintiff, of the tools provided by the journeyman being proper tools; so that, if the learned trial Judge was right in his view that the tool was a dangerous one for the purpose, and that the accident occurred from its unfitness, the defendant's liability is, I think, established.

That view of the learned trial Judge is borne out further by the fact that other tools, apparently, were sought, as being more suitable ones; but for some reason were not got.

Mr. Beairsto, the manager of the defendant Company, said, in his evidence, that there were other ways in which concrete could be cut, and that it could be done "automatically". No attempt was made to show that, because of expense or otherwise, it could not have been so cut in this case.

I would dismiss the appeal with costs.

PERDUE, J.A. The plaintiff was, at the time of the accident which caused the injury in question, a boy about sixteen years of age. In October, 1909, he had been apprenticed by his father to the defendants in order that he might learn the plumbing business. In January, 1912, a plumber named Arkell, who was in the employ of the defendants, was sent by them to do certain plumbing work at the St. Regis Hotel. The plaintiff was sent along with Arkell as his helper. It was found that, in order to instal certain pipes and fixtures in the basement, a considerable quantity of concrete had to be cut away. Arkell sent the plaintiff to defendants' shop to bring laborers to cut the concrete. Two laborers were sent for this purpose, but they were afterwards withdrawn and orders given by the defendants that Arkell and the plaintiff should do the work themselves. They were assisted by a laborer who was supplied by the owner of the hotel. The defendants and the proprietor for whom the work was being

done considered that in this way it could be done more cheaply.

The plaintiff was employed in holding the drill while either Arkell or the laborer struck it with a sledge hammer. The plaintiff had to hold the drill with both hands and keep turning it, while he was in a kneeling position. When so holding it, the top of the drill came even with his face and, as he held the drill with both hands, it must have been close to his face. While the laborer was striking and the plaintiff holding the drill a piece of steel flew from the top of the drill and pierced the plaintiff's eye, causing such injury that the eye had to be removed.

From the evidence it appears that the boy was sent by defendants to assist in the work and that he was under the directions of Arkell. He had never done this class of work before and did not know the dangerous nature of it. That it was dangerous is, to my mind, clear from the evidence. It was shown that pieces of steel might fly from the top of the drill on its being struck heavily with a sledge hammer in the hands of the person who was trying to cut into or break the concrete. The dangerous nature of the work is, to me, self-evident. The drill that was used was produced at the trial and it is plain, from the broken and battered condition of the head of it, that anyone holding it in the position in which this boy had to hold it, while blows were struck upon it with a sledge hammer, ran great risk of being injured by flying splinters of steel. It was argued that there was no evidence to show that the drill was in the same condition when produced at the trial as it was when the injury was caused. But there was no evidence offered by the defendant to show that its condition had been materially changed in the meantime. The plain inference which the trial Judge might draw from the evidence and from an inspection of the tool itself is that

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the head of the drill crumpled under the blows of the sledge and that splinters of steel broke off. It is certain that one of these splinters flew from the drill under a stroke from the sledge, with such force that the splinter imbedded itself in the boy's eye so deeply that it could not be extracted.

The cutting or breaking up of concrete could not reasonably be regarded as part of the trade of a plumber, although Beairsto and Arkell indicate that plumbers sometimes do that class of work where it is necessary in connection with ordinary plumbing work. The plaintiff's father did not know that the boy would be set to do the work he was doing when he received the injury, and, as he declares, would not have placed him with the defendants if he had known he would be so employed.

The work was, as I have shown, of a dangerous character and one not contemplated by the plaintiff's father or by the plaintiff himself when he was apprenticed to the defendants. No warning was given to the plaintiff of the danger, he was ignorant of it, and no precaution whatever was taken to protect him. The boy was ordered to hold the drill with both his hands so that his face was close to the point of danger. No contrivance for holding the drill, so as to keep it at a distance from his face, was furnished to him, and no shield for his eyes was provided. The drill that was furnished was not a safe one. In these circumstances, I think there is a common law liability for negligence on the part of the defendant. The result of the later decisions is summed up by Romer, L.J. in these words: "If the employment is of a dangerous nature, a duty lies on the employer to use all reasonable precautions for the protection of the servant. If by reason of breach of that duty a servant suffers injury, the employer is *prima facie* liable:" *Williams v. Birmingham, etc.* [1899] 2 Q.B. 338, at p. 345.

The facts and circumstances in this case completely

displace the application of the maxim, "*volenti non fit injuria*."

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J.A.

It is argued that the drill was not furnished by the defendants and that they are not responsible for its defective condition, because Arkell borrowed it from another plumber. The answer to this is: the defendants ordered Arkell to do the work, using the boy as a helper; there was a duty owed by them to the plaintiff to provide safe and proper tools with which to do the work; they left it to Arkell to provide tools and, if the drill he provided was defective, they are, as between them and the plaintiff, responsible for what Arkell did, his act in procuring the drill being their act.

I think the appeal should be dismissed with costs.

HAGGART, J.A. The plaintiffs urge that the system or methods or appliances were defective. In this connection it is to be observed that the plaintiff had been in the employ of the defendant Company for over two years and had never done any such work before. Arkell, the foreman, sent the plaintiff to the shop to bring laborers to remove the cement, and laborers were to be sent from the shop; but, word arriving later that they were not coming, Arkell, no doubt with the object of making some progress, with the plaintiff began working in the manner which resulted in the accident. They take the available tools, a sledge and a chisel. This is the one solitary instance in which the plaintiff was required to do this kind of work. I do not think that the using of that sledge and chisel at that particular time under the circumstances was the establishing of a defective system, the furnishing of defective machinery or the creating of a dangerous place in which to work, so as to bring this case within the reasons given for the judgments in *Smith v. Baker*, [1891] A.C. 325; *Ainslie v. McDougall*, 42 S.C.R. 420, and *Brooks v. Fakkema*, 44 S.C.R. 412. It was one piece of work done by a foreman which in

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Judgment. his judgment ought to be done in that way at that time under the existing circumstances.

HAGGART,  
J.A. The fact that the borrowed chisel in the possession of the foreman Arkell had a somewhat battered head and was brought into use on that occasion, is not sufficient in itself to establish negligence on the part of the defendant Company. The utmost that could be said is that the use of it was a specific act of negligence on the part of a fellow workman, which caused an injury to another in the common employment of the defendant Company: *Hastings v. Le Roi* (No. 2) 34 S.C.R. 177.

Mr. Justice Davies, in *Canada Woollen Mills v. Traplin*, 35 S.C.R. at p. 429, whose reasons were adopted by the majority of the Court, throws some light on the foregoing propositions, when he is drawing a distinction between the case at bar and that of *Hastings v. Le Roi*, No. 2. In the latter case the foreman had neglected to supply a proper hook for the hoisting gear after the defect in the one being used had been reported to him. It was held that the negligent workman and the injured workman were in the common employ of the defendants and the doctrine of common employment could be invoked, and that it was a specific act of negligence on the part of a fellow workman which caused the injury, but in the case before him the negligence found as responsible for the injury was not that of a fellow workman, but the negligence of the defendant Company in failing to see that the works were suitable for the operations being carried on with reasonable safety. The cause of the accident was a dilapidated elevator, over twenty years in use, which had fallen before on the same day. Mr. Justice Nesbitt dissented, holding that, as the Company had employed a competent person to attend to the working of the elevator, it was not liable at common law, although it was liable under the Employers' Liability Act.

The plaintiffs try to bring home responsibility and



fasten the liability directly upon the defendant Company through the evidence of their manager, Beairsto, who testified that his duties were "to look after all the work, figure on all the work, to see that it was done, that it was carried out, hire all the men and fire all the men," and who, from his actual observation, knew how the concrete was being removed and practically justified the methods of the foreman Arkell who had direct charge of this St. Regis work.

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Even if Beairsto, who managed all the business of the Company, had actual knowledge of, approved of, adopted and ratified what Arkell was doing in this particular work, that would not be binding upon the Company. Whatever his powers and duties might be, he was manager, and as such was a fellow workman with the humblest labourer or apprentice in the employ of the defendant Company.

The defence of common employment applies alike to the negligent acts of the foreman Arkell and the manager Beairsto.

The defendant company is the master, and its duty is to employ proper and competent persons to superintend and direct the work, and if the persons so selected are guilty of negligence that is not the negligence of the master. The master has done all he is bound to do and there is no evidence as to the incompetence of either Arkell or Beairsto.

In *Wilson v. Merry*, L.R. 1 H.L. Sc. 326, on p. 334, Lord Cranworth says: "Workmen do not cease to be fellow workmen because they are not all equal in point of station or authority. A gang of labourers employed in making an excavation and their captain, whose directions the labourers are bound to follow, are all fellow labourers under a common master."

In *Howells v. Landore, &c., Co.*, L.R. 10 Q.B. at p. 64, Cockburn, C.J. says: "Since the case of *Wilson*

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v. *Merry* in the House of Lords, it is not open to dispute that in general the master is not liable to a servant for the negligence of a fellow servant, although he be the manager of the concern."

It may be that Beairsto, who appears to have been a dictator in the business of the Company which bears his name, owns ninety per cent. or more of the stock of the defendant Company, and that a liability of the Company would be in effect equally a loss to himself, yet I do not think that will help the plaintiff. The suit is against the corporation.

In *Matthews v. Hamilton Powder Co.*, 14 A.R. 261, in an action for damages by the administratrix of an employee of the defendant Company, who was killed by an explosion of the defendant's powder mill caused by a portion of the machinery being out of repair, it was shown that a director of the Company had given instructions to the superintendent and head of the works to have the machinery repaired. The superintendent or manager neglected to have the repairs made. There was no suggestion that the manager was an incompetent person. It was held, reversing a judgment of the Queen's Bench Division, that the intervention of the directors had not taken the case out of the general rule of law that the defendants were not responsible for an accident due to the negligence of a fellow servant, which this superintendent and head of the works was. See *Wood v. C.P.R.*, 30 S.C.R., 110; *Hedley v. Pinkney Co.*, [1894] A.C. 222; *Johnson v. Lindsay*, [1891] A.C. 371; *Dixon v. Wpg. Elect. St. Ry. Co.*, 11 M.R. 528; *Woods v. Toronto Bolt and Forging Co.*, 11 O.L.R. 216.

I regret not being able to affirm the judgment of the trial Judge. \$2,000 is a poor compensation to a young man, who has to earn his living, for the loss of an eye. Common employment is a good defence to the action at common law, and the damages should be reduced

to the amount allowed by the Workmen's Compensation for Injuries Act, which I compute at \$780.

HOWELL, C.J.M., and CAMERON, J.A., concurred with Richards, J.A., and Perdue, J.A.

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*Appeal dismissed.*

### COURT OF APPEAL.

#### PICKERING V. GRAND TRUNK PACIFIC RY. CO.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*New trial—Excessive damages—Judge's charge to jury—Misdirection and non-direction—Injury caused by negligence.*

In estimating the amount of damages to be awarded to a plaintiff for an injury caused by defendants' negligence and rendering the plaintiff incapable of following his career as a railroad fireman, the jury should not give such a sum as would be simply an investment for the plaintiff and enable him to live thereafter without working, if he is still capable of earning a livelihood in other ways, and should take into consideration the chances and accidents of life and other elements, and, if the charge of the trial Judge is such as to lead the jury to infer that they need not consider the facts that the plaintiff is not wholly disabled and still has reasonable opportunities of engaging in other employment, having a fair education, and the amount of the verdict is so large as to lead to the inference that they did not consider those facts and is far in excess of what the Court thinks reasonable under the circumstances, there should be a new trial.

So held by RICHARDS, PERDUE and HAGGART, J.J.A., following *Johnston v. Great Western Railway*, [1904] 2 K.B. 250, and *Rowley v. London and N. W. Ry.* (1873) L. R. 8 Ex. 221.

HOWELL, C.J.M., and CAMERON, J.A., dissented, holding that, although the amount of the verdict was, in their opinion, too large, yet it was not so large as to be perverse or to indicate that it must have been based on an untenable measure of damages, that non-direction had not been complained of at the trial, and that there had been no such misdirection by the trial Judge as to warrant an order for a new trial.

ARGUED: 22nd October, 1913.

DECIDED: 24th November, 1913.

THIS action was brought by the plaintiff, a locomotive fireman at the time of the accident in question, in the employment of the Canadian Northern Railway Co.,

Statement.

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Statement. against the defendant Company for injuries sustained by him March 11, 1912, at Paddington St., St. Boniface, on the railway track of the Canadian Northern Railway Company.

The plaintiff was, it was alleged, underneath his engine removing ashes from the fire-box, when the defendant Company, by its agents and servants, caused a train of cars to run into the rear of the train of cars to which the said engine was attached and thereby caused the engine to pass over and mangle the plaintiff's left leg.

The action was tried before Curran, J., and a jury. when a verdict was given for the plaintiff for \$10,000 damages and judgment was entered accordingly.

Defendants appealed.

*C. P. Fullerton, K.C.*, for defendants, appellants, cited *Coutlee v. G.T.R.*, Q.R. 23 S.C. 242; *Schwartz v. Winnipeg Electric Ry.*, 22 M.R. 483; *Johnston v. G.W.R.*, [1904] 2 K.B. 250; *Phillips v. S.W.R.*, 4 Q.B.D. 407; *Gordon v. C.N.R.*, 2 W.W.R. 114; *Tobin v. C.P.R.*, 1 W.W.R. 1252, and *Bateman v. Middlesex*, 27 O.L.R. 122.

*W. H. Trueman* for plaintiff, respondent.

HOWELL, C.J.M. To my mind the only ground upon which the verdict might be assailed is the amount of the damages.

If the matter had come before me for decision, I would have fixed the amount at a much lower sum. The plaintiff, a young man of twenty-three, with fair education, chose the occupation of fireman upon a railway engine. and was earning from \$80 to \$100 per month. I shall assume what probably the jury assumed, that this occupation he hoped, and probably with good reason, would be merely a stepping stone to that of engineer and perhaps in the future something in railway work even higher.

Still it would be probably railway work and, besides the ordinary chances and accidents of life, there is connected with it the peculiar risks of that dangerous occupation. The accident has deprived him of the position in life which he chose to adopt; he has lost many months of time, has endured great suffering and has lost part of his leg below the knee, but I gather he has the benefit of the knee joint. On the other hand, there are many other occupations which he might adopt and which are not as dangerous as the occupation which he had chosen, and this should be considered by the jury in estimating the damages. The plaintiff is not to remain idle and do nothing because he cannot work on a railway engine and, if he cannot get railway work, there are other avenues open.

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To my mind it would have been better if the learned Judge had told the jury to consider the life work which might be still open to the plaintiff and to consider the accidents and incidents of life and the peculiar dangers of railway work which might be avoided in other occupations, and keep all this in view in assessing the damages.

Much stress was laid by counsel for the defendant on a statement made by the learned Judge in the charge, "Put yourselves in his place." Objection was taken to this and the jury was recalled and the Judge told them, in reference to the above, as follows: "I desire now to tell you that you must not pay any attention to it; that you must not in your mind's eye put yourselves in this man's place." The first statement was unwise, but the second one the plaintiff might complain of. From my experience at the Bar, I should say that, while trials by jury last, juries, at all events sympathetic and imaginative ones, will continue—in their imagination—to place themselves in the environment so as to draw their conclusions of fact, and thus perform some of the true functions of a jury.

Because of the tendencies of juries to give large

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damages against corporations, it is prudent for Judges to charge carefully as to measure of damages that this tendency may be met.

It seems to me that the objection of counsel to the charge as to damages was merely that the learned Judge had used the expression above referred to, which he corrected on the recall. Whatever objections there may be on the ground of non-direction in the charge, no objection was taken on this ground, and Lord Halsbury, in *Nevill v. Fine Arts*, [1897] A.C. at 76, uses this language:

"But what puts him out of court in that respect is this, that, where you are complaining of non-direction of the Judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking it, no Court would ever have granted you a new trial." See also *Seaton v. Burnand*, [1900] A.C. 135.

Reading the correction as to misdirection made on the recall of the jury, I cannot say that this caused such substantial wrong as, under Rule 660, would require the granting of a new trial.

After carefully reading the charge and the several objections to it and considering what was stated on the recall, and considering that there were no objections as to non-direction, I do not think that because of the charge the plaintiff should be put to all the expense of a new trial to obtain his rights.

The amount of the verdict is not in harmony with my judgment. Such a judgment thirty years ago, when dollars were much more valuable than now, would have been startling. The jury is the tribunal to judge this matter, and the verdict is not to be set aside merely because, in my judgment, I would have given much less: *Toronto v. King*, [1908] A.C. 260. I cannot say that the verdict was unreasonable and almost perverse which seems to be

the measure required in granting a new trial: *Cox v. English*, [1905] A.C. at 170.

I would dismiss the appeal.

RICHARDS, J.A. This was an action to recover damages for injuries caused by negligence of the defendant's servants in operating a railway train. The result of the injury was that the plaintiff was obliged to undergo several operations and lost his left leg below half way from the foot to the knee. He was in hospital eight or nine months and during that period suffered from diphtheria and pneumonia. He was a young man of twenty-three or thereabouts at the time of the injury, and earning in the neighborhood of \$90 a month as a fireman. The jury gave a verdict in his favour for \$10,000 and from that verdict the defendants have appealed.

Although several grounds were urged in support of the appeal, I do not think there is anything to be considered but the amount of the damages, which certainly seems very large, and parts of the learned Judge's charge.

The learned trial Judge charged the jury very ably on all other points, but I think he should not have used the following language:

"Now, it has been suggested that he is a young man and that there are other avenues of occupation in life open to him. Well, I can only say, Put yourselves in his place, as to that argument. Is there any man of you that would be willing to have a leg taken off below the knee and say, Well, there are other opportunities of earning a living; I am a well educated man and there are lots of things I can turn my hand to. Do you think that would be much of an argument? If so, give what effect to it you think it merits. Apparently a railroad career is the one the plaintiff started out on and he was earning in the neighborhood of \$80 to \$100 a month. Is this avenue of occupation still open to him? It seems to me this accident has debarred him, shut him out from a career as a railroad man, excepting in some of the humbler walks in that

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calling, which would not give a man much opportunity to do more than earn a day's bread."

After the jury had retired, objection was taken to this charge by counsel for the defendants, in the following words:

"In dealing with the question of damages and with the argument which I made, namely, that in considering the question of damages it would be fair to consider that this young man was only two years in the service of the railway company, and had an education and was able to earn a living in other ways, having such an education, Your Lordship used these words 'Put yourselves in his place.'"

Though this objection, strictly read, seems only to take exception to the use of the words, "put yourselves in his place," I think the intent was to object also to the way in which the Judge had referred to the plaintiff's chances of making his living in the future.

The Judge recalled the jury, and used the following language:

"Now, I made use of an expression to you that perhaps it is true I should not have, and I desire you to eliminate from your minds any impression that may have been conveyed to you by what I said. I made use of the expression, 'Put yourselves in his place.' Now, I should not have done that. It was a slip of the tongue, a *lapsus linguae*. It is very difficult for a Judge off-hand to charge a jury upon questions of fact and law without having time to consider and weigh his words. So that, if you remember that expression as coming from me, I desire now to tell you that you must not pay any attention to it. That you must not in your mind's eye put yourselves in this man's place, and you will consider the question as if these words had not been spoken at all." He said nothing in correction of his references to the plaintiff's prospects in life.

It is argued by counsel for the plaintiff that, the Judge having given the above direction, the objection to the earlier part of his charge was removed.

With deference, I am unable to take that view. When



the learned Judge in the language used by him told the jury to put themselves in the plaintiff's place, he must, I think, have made an impression on their mind which could hardly be removed by what he afterwards said.

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Then, also, I do not think that he should have referred, as he did in the charge, to the plaintiff's opportunities of earning a living in the condition in which he is left with part of his leg gone. I take it to be a necessary part of a charge to the jury in a case of this kind to direct them that, in arriving at the quantum of damages, they must take into consideration and give weight to the opportunities in life still remaining to the plaintiff. That does not seem to me to have been stated to the jury as it should have been. The latter part of the first quotation above given from the charge seems to imply that the plaintiff's only opportunity in life would be in the humbler walks of his calling as a railroad man. There are other lines of life than railroading in which the plaintiff could make a living, he being a man of some education, and the jury should have been instructed to take that into consideration in arriving at their verdict.

With the utmost deference, I am of opinion that, in view of the size of the verdict, there is reason to believe that the amount was unduly increased by the effect of the charge, and that, but for that, the amount would have been smaller.

If the jury had been charged as I think they should have, on these points, and the verdict had still been \$10,000, I should require further consideration before deciding that it was a case for a new trial, even though the damages are so unusually large; or if, notwithstanding the charge, the damages had been half of the sum awarded, I should doubt whether we ought to order a new trial, as it would then be doubtful whether the charge had improperly influenced them. But when, after being so charged, the jury gave the equivalent of about ten years

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of the plaintiff's earnings at the time of his injury, I cannot but think, as stated above, that the charge affected them by causing them to take into consideration, in aggravation of damages, things that they should not so take, and to omit from consideration matters which should be given their attention in mitigation of damages.

I would allow the appeal and order a new trial. Costs of this appeal and of the trial already had to be costs in the cause.

PERDUE, J.A. One objection raised by the defendants was to the effect that it had been proved that the defendants' servants who caused the injury were at the time acting within the scope of their authority.

I think there was sufficient evidence to support a finding that the accident was caused by the negligence of the defendants. The argument based upon an alleged disobedience of certain rules of the Canadian Northern Railway as affording evidence of contributory negligence must, I think, fail. There remains only one serious contention, that the damages were excessive and that there was in this regard mis-direction and non-direction on the part of the learned trial Judge.

The plaintiff was at the time of the accident twenty-three years of age. He was a fireman in the employ of the Canadian Northern Ry. Co. and had been so for six months. For a year and a half previously he had been employed by that company as a cleaner. He was earning about eighty dollars a month at the time he received the injury. He has a fair education. The injury was a very severe one. There appear to have been several operations on the foot and leg, finally resulting in the leg being amputated below the knee. The jury awarded ten thousand dollars damages.

It appears to me that, even allowing for everything which the jury might properly take into account, the damages are excessive. The Court is asked to set aside

the verdict and order a new trial upon the ground that the learned Judge had not properly directed the jury on the subject of damages. In summing up he said to the jury, at the close of his address:

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"Now, it has been suggested that he is a young man and that there are other avenues of occupation in life open to him. Well, I can only say, Put yourselves in his place, as to that argument. Is there any man of you that would be willing to have a leg taken off below the knee and say, Well, there are other opportunities of earning a living, I am a well educated man and there are lots of things I can turn my hand to? Do you think that would be much of an argument? If so, give what effect to it you think it merits. Apparently a railroad career is the one the plaintiff started out on and he was earning in the neighborhood of \$80 to \$100 a month. Is this avenue of occupation still open to him? It seems to me this accident has debarred him, shut him out from a career as a railroad man, excepting in some of the humbler walks in that calling, which would not give a man much opportunity to do more than earn a day's bread. I will not hinder you any longer by saying anything further to you upon this question of damages. I have indicated to you fairly well what you ought to take into consideration, and, of course, you are the judges and are here for that purpose."

After the jury had retired counsel for the defendants took the following objection, amongst others, the learned trial Judge apparently interrupting with the remark that immediately follows:

"It seems to me that the way Your Lordship put this question of damages before the jury was not a fair way of putting it according to our point of view. In dealing with the question of damages and with the argument which I made, namely, that in considering the question of damages it would be fair to consider that this young man was only two years in the service of the railway company, and had an education and was able to earn a living in other ways, having such an education, Your Lordship used these words, 'Put yourselves in his place.'—"

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"His Lordship—Yes, I did not mean to use that expression, and shall tell them so when I recall them. It was what might be called a *lapsus linguæ*."

The defendant's counsel then went on to speak of other matters of objection not connected with the question of damages. The trial Judge recalled the jury and instructed them to pay no attention to the words, "put yourselves in his place," and directed them to consider the question as if these words had not been spoken; but he did not make any modification of the remainder of the direction as to damages.

It appears to me that the objection made by counsel to the charge was two-fold: First, that it might fairly be left to the jury to consider that the plaintiff, with the education such as he had, was still able to earn a living in other ways; secondly, that it was incorrect to say to the jury, "put yourselves in his place." At all events, I think it was sufficiently indicated by counsel that objection was taken to the direction dealing with the question of the plaintiff's capability of still earning money in other occupations. If the counsel had not been stopped by the learned Judge, the objection would, probably, have been more fully stated.

Now, supposing that we eliminate from the portion of the charge to the jury above cited, the words, "put yourselves in his place," we still have expressions left which I think the jury would understand as a direction that they need not take into account the fact that the plaintiff still had opportunities of earning money in other occupations. I think the jury was left with the impression that compensation should be awarded simply upon the basis that the plaintiff had been debarred from his career as a railway man except in a very humble position, "which would not give a man much opportunity to do more than earn a day's bread." Looking at the amount of the verdict, I think that, even if we allow for every

thing which the jury should properly take into consideration, there would remain a sum so large that the jury must have attempted to give the plaintiff a complete compensation for the expected loss of income from railway employment during his life.

In *Johnston v. Great Western Railway*, [1904] 2 K.B. 250, Grantham, J., in charging the jury said:

“There is loss of five hundred pounds a year on what he (the plaintiff) is earning already — the difference between what he is able to earn now and what he would have earned but for this accident. Give him such compensation as you think will put him in the position in which he would have been.”

In dealing with this charge, Vaughan Williams, L.J., said:

“If the summing up had stood there, I should have said there was a clear misdirection, because the plaintiff ought not to be put in the position in which he would have been by making such a calculation as that which the learned Judge has referred to, for the jury are bound to take into consideration the chances and accidents of life, and a number of other matters. But the learned Judge, in the very next passage, gave the jury a sufficiently plain instruction based on the judgment in *Rowley v. London & North Western Railway*, L.R. 8 Ex. 221, for he said: ‘There are the accidents of life and other elements which have to be taken in consideration which ought to prevent you giving him such a sum as would be simply an investment for him, and enable him to do nothing. Still he is entitled to a fair sum, considering the position for which he was fitted, and the position in which he is now.’ I think that direction is accurate and cannot be complained of.”

The fact that the plaintiff is by no means wholly disabled and that he has reasonable opportunities of engaging in other employments, is one which should have been taken into account by the jury. With great respect, I think the meaning they would take, and did take, from the learned Judge’s charge was, that they were at liberty

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to leave the fact as to other occupations being open to the plaintiff out of consideration in arriving at the amount of the verdict.

I am sorry that the plaintiff should be put to the expense of a new trial in this case, simply on the question of damages. If I could see my way to supporting the verdict, in so far as the quantum is concerned, I would gladly do so. I hope the parties may be able to settle the amount of the damages without the necessity of going to the expense of another trial. In the meantime I see no other course open than to order a new trial, the costs of this appeal and of the former trial to be costs in the cause.

CAMERON, J.A. This appeal is taken to set aside the judgment on various grounds.

The Canadian Northern train of about twenty cars, to which was attached the engine on which the plaintiff was working, had been on the main line of the Canadian Northern and was backed up on the Bird's Hill branch about 6 o'clock of March 1, 1912, in order to clear the main line for an approaching passenger train due to pass about that time. The engine was at the point marked XE, on the plan filed, at a standstill with the brakes on. The plaintiff then asked the engineer if it would be all right for him to go under the engine to clean the ash-pan, and he said "Yes." The plaintiff was in the act of getting under when the wheels moved and one of them ran over his foot.

Foster, the yardmaster of the Canadian Northern Railway, says that he told Thompson, the foreman of the Canadian Northern train, that there were some fruit cars on the transfer for the Canadian Northern. Foster then went down to the diamond, saw a Grand Trunk Pacific crew and asked Carroll, the foreman of that crew if "as a matter of convenience he would pull the three cars over for us, as he had one car for the Grand Trunk

Pacific." Carroll's reason for being there with an engine was to get this Grand Trunk Pacific car. These four cars were in what was known as the C.P.R. transfer track, lying alongside and north of the Canadian Northern track. Carroll states how he took these four cars, went east with them to the Bird's Hill branch, set the G.T.P. car and a caboose on the "new track" and then shunted the three cars to and coupled them with the C.N.R. train. It was unquestionably this impact that set the train in motion and caused the injury to the plaintiff. Plunkett, the engineer of the G.T.P. train, gives an account of the event, and tells that after backing the one car and the caboose into a small spur, he, on signal, went ahead east and then backed up west towards the C.N.R. train which had backed into the Bird's Hill branch, and made a coupling with the C.N.R. train. He then backed into the spur and got his car and caboose and went to Strathcona, knowing nothing of the accident. This witness gave evidence as to the advisability of the course adopted in order to get hold of the G.T.P. car.

The question is raised whether the G.T.P. crew was not acting in excess of authority and it is objected that the learned trial Judge misdirected the jury on this point. The trial Judge referred to the statement of defence, in which it is set forth that the defendant Company and the C.N.R. were jointly using freight terminals in Winnipeg and such joint use included the Bird's Hill branch, that on the day in question the defendant Company was requested to deliver to the C.N.R. the three cars and that in accordance with this request the defendant Company coupled the said cars to the C.N.R. train, alleged that the defendants' servants and workmen observed due care and obeyed the rules and regulations of the Company and that the accident was due to the neglect of the C.N.R. He called attention to Foster's evidence (and, it is to be noted, Foster was a witness for

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the defence) that he told Thompson, the foreman of the C.N.R. crew, that there were cars for him on the C.P.R. track and that Foster afterwards went to Carroll and made arrangements with Carroll to move these cars. The trial Judge also called attention to the discrepancy between the evidence of Foster and Thompson as to the interview spoken of by Foster.

Upon consideration, I cannot see that the learned trial Judge misdirected the jury. There was an arrangement between these two companies for the joint use of these terminals and of the Bird's Hill track. The foreman of the G.T.P. crew had the authority of the yardmaster for what he did. The yardmaster gave his direction as to what was to be done as being necessary or highly convenient for both companies under the circumstances. I do not think it can be held otherwise than that the G.T.P. foreman and crew were acting within their authority. There is nothing on which the jury could base a contrary finding had the question been left specifically to them.

As to the rules of the C.N.R. which the defendant Company relied upon, I think the learned trial Judge placed these and their effect fairly before the jury. It would be giving rule 26 a strained construction to hold that it distinctly imposed on the C.N.R. crew a duty so imperative as to disentitle this plaintiff to relief as against the defendant Company. The rule is evidently intended for the protection of the workmen themselves and is not available as a weapon of defence to an outside party. Nor would it follow that non-compliance with the rule would affirmatively establish either that the plaintiff's own negligence was the proximate and efficient cause of the accident or that he had by his action voluntarily assumed the risk. As for rule 99, the trial Judge intimated that it was not applicable in this case, and it does appear to me on the evidence that, in this, he was right.



The point was left to the jury to decide and there was no doubt in their minds.

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The main question before us for consideration is that of damages which the jury fixed at \$10,000. The plaintiff was at the time of the trial twenty-three years of age. The accident happened March 1, 1912, and the trial took place March 4, of this year. The plaintiff had been with the Canadian Northern Railway Company for two years and a fireman for six months; before that he was a locomotive cleaner. He was earning about \$80 per month for the six months. After the accident he was taken to the St. Boniface Hospital and operated on, but his foot was not removed until subsequently. He then contracted diphtheria and after his recovery therefrom, about three months after the accident, his foot was amputated below the ankle, and five months after the accident his leg was amputated below the knee. During the last operation he had pneumonia.

It is urged that the damages awarded are excessive and that there must be a new trial on this ground.

On this point we are referred by counsel for the appellants to *Schwartz v. Winnipeg Electric*, 23 M.R. 483; *Johnston v. Great Western Ry. Co.*, [1904] 2 K.B. 250, and *Phillips v. South Western Ry. Co.*, 4 Q.B.D. 406. On the other side we were referred to *Hesse v. St. John*, 30 S.C.R. 218; *Gordon v. Canadian Northern Ry. Co.*, 2 W.W.R. 114; *Tobin v. Canadian Pacific Ry. Co.*, 1 W.W.R. 1252, and *Bateman v. Middlesex*, 27 O.L.R. 122.

Lord Justice Vaughan Williams, in *Johnston v. Great Western Ry. Co.*, *supra*, discusses the various cases on the subject of ordering a new trial in cases of excessive damages. As to an alleged over-estimate of damages, the Court might be prepared to say that they were larger than the Court would have given, but not so large that twelve sensible men could not reasonably have given

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them. Yet that would, he held, not necessarily dispose of the matter. Because it might appear, even though the Court could not regard the damages as perversely large or such as twelve sensible men could not reasonably have given, yet the amount and the circumstances of the case might enable the Court to say that the jury must have disregarded a direction as to damages which they ought not to have passed over, as in *Phillips v. South Western Ry. Co.* So where the damages were attacked as being too great instead of as being too small, as in the Phillips case, the rule would apply. He sets forth at some length the judgment of Lord Chief Justice Cockburn in the *Phillips* case (4 Q.B.D. 407), and adds, "So in the present case, if I could come to the conclusion that, looking at the figures, the jury must have taken into account some head or some measure of damage not properly involved in or applied to the plaintiff's claim, I should say that we ought to order a new trial," p. 256. These considerations are luminously elaborated by the Lord Justice at pp. 257 and 258.

Upon giving the authorities and the circumstances of this case the best consideration I can bring to bear, I cannot say that the amount of the damages here is such that it could not be awarded by a jury of sensible men, though I am bound to state it surpasses the amount I should be disposed to allow were I trying the case alone without the assistance of a jury. Nor can I come to the conclusion that the jury have taken into account some topic or measure of damages which should not properly be made applicable to the plaintiff's claim. I cannot conclude that the amount fixed demonstrates that the jury awarded a sum as an investment, enabling him to wholly dispense with earning a livelihood, irrespective of the accidents of life. All I feel that I can say is that it is a case where it is difficult to estimate the damages, and that I think they are on too generous a scale. But there

are many and substantial matters material to the question of damages, such as the jury had under consideration, and these will readily occur to the mind of any one.

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The career of the plaintiff as a railway employee, with his possible promotions and increased earning capacity, is at an end. The plaintiff himself appeared before the jury and told them the tale of his position, his earnings, his sufferings, surgical operations, illnesses and condition. I may think, and do think, the verdict was for too large an amount. But I cannot say that it was so large as to be, in my judgment, perverse or to indicate that it was founded upon an untenable measure of damages.

As to the expression used by the trial Judge to the jury: "Put yourselves in his place," that was, no doubt, improper. But, when the attention of the learned trial Judge was called to these words, he withdrew them on reassembling the jury, and the jury were told to consider the matter as if they had not been uttered. In those circumstances, I am unwilling to believe that the jury could have been influenced by an expression thus withdrawn. As a matter of fact, the thought underlying the expression is almost certainly bound to occur to any mind considering accidents of this kind. That the trial Judge put the natural thought in words is not likely to have led the jury astray in view of his emphatic correction, and of the unexceptionable rules they were directed to follow in estimating damages as set out at page 201 of his charge.

I think the appeal must be dismissed.

HAGGART, J.A., concurred with Richards, J.A., and Perdue, J.A.

*Appeal allowed.*

*New trial ordered*

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## CUMMINGS V. JOHNSON.

Before MATHERS, C.J.K.B.

*Assignment of chose in action—Set-off between debtor and assignee—Claim by debtor for damages against assignor—Action of deceit—King's Bench Act, R.S.M. 1902, c. 40, s. 39 (f), Rules 291, 293—Misrepresentation—Damages, measure of.*

This action was brought to recover the amount of a mortgage given by the defendant to M. and F. for the balance of the purchase money of a factory bought from them by defendant, which mortgage had been assigned to the plaintiff for valuable consideration. The plaintiff had no knowledge of any fraud on the part of M. & F. in making the sale to the defendant.

The trial Judge found as a fact that M. & F. had been guilty of such fraudulent misrepresentation as to material points inducing the sale that the defendant, though he could not have the sale rescinded because he had taken possession of, and operated, the factory for six months when it was destroyed by fire, yet had a right to recover against M. & F., made defendants by way of counter claim, damages as in an action of deceit to the extent of the difference between the price paid for the property and its real value.

The defendant also claimed that he had a right to set-off these damages against the plaintiff's claim, and counterclaimed for the amount against the plaintiff.

*Held*, that, as the claim of defendant for damages for deceit could not be pleaded either as a defence or set-off, but only by way of counterclaim, had the action been brought by M. & F., therefore subsection (f) of section 39 of the King's Bench Act, which makes an assignment of a chose in action, subject to any defence or set-off in respect of the debt or chose in action \* \* \* "in the same manner and to the same extent as such defence or set-off would be effectual in case there had been no assignment", gave defendant no right to set it up as against the plaintiff.

Neither do Rules 291 and 293 of the King's Bench Act assist the defendant, for they apply only to a counterclaim against the original contractor, and not one against an assignee from him, and a claim for damages unconnected with the contract cannot be set off against the assignee.

*McManus v. Wilson*, (1908) 17 M.R. 567, and *Stoddart v. Union Trust, Ltd.*, [1912] 1 K.B. 181, followed.

The result would be the same if the plaintiff had been suing as assignee of the defendant's agreement to purchase instead of upon the mortgage given in pursuance of it.

*Stoddart v. Union Trust, Ltd.*, (*supra*).

Damages arising out of a breach of the contract assigned may be set off against a claim under the contract: *Young v. Kitchen*, (1878) 3 Ex.D 127, *Newfoundland v. Newfoundland*, (1888) 13 A.C. 199.

*Semble*, if the defendant were in a position to repudiate the contract because of his vendors' fraud, he might set up the fraud by way of defence, even as against a *bona fide* assignee: *Stoddart v. Union Trust, Ltd.*, (*supra*).

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ARGUED: 14th April, 1913.

DECIDED: 24th July, 1913.

IN January, 1912, the defendant entered into an agree- Statement.  
ment to purchase from Munroe Bros. & Ferris, the defend-  
ants by way of counterclaim, a lightning rod factory and  
business at Cartwright in this Province. The purchase  
price was \$60,000, which was partially paid by trans-  
ferring to the vendors certain real estate and the balance,  
\$32,325, was secured by a mortgage upon the factory  
building and land on which it was situate. The  
defendant also gave a chattel mortgage upon the machin-  
ery and an assignment of book accounts both as collateral  
security to the mortgage before mentioned. The vendors  
subsequently assigned the mortgage to the plaintiff for  
valuable consideration.

The defendant paid nothing upon the mortgage either  
by way of principal or interest, and this action was  
brought by the plaintiff against him to recover the full  
amount.

The defendant counterclaimed against the vendors and  
the plaintiff for damages, alleging that he was induced to  
purchase the property in question by fraudulent repre-  
sentations made to him by the vendors. He sets out in  
his pleading a number of representations which he stated  
were false, but none of them appeared to amount to a  
false representation of an existing fact, except two,  
namely, that the vendors had made out of the sale of  
goods and commissions, clear, over \$56,000 in the year  
1911, and that they had only one competitor in Canada.

In February, 1912, the defendant went into possession  
and commenced operating the factory, and he continued  
to operate it until August following, when the factory  
was burned down. It was admitted by the defendant

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Statement. that he was not in a position to ask for rescission and that he had to rely on his claim for damages as in an action of deceit.

*H. V. Hudson and W. J. Donovan* for plaintiff.

*J. H. Leech, K.C., and F. J. Sutton* for defendant.

*A. E. Hoskin, K.C., and P. J. Montague* for Munroe.

MATHERS, C.J.K.B. I find as a fact that the vendors did represent that they had made a clear net profit of \$56,000 in 1911 and that they had only one competitor in Canada. I find that both of these representations were untrue to the knowledge of the vendors and that they were made fraudulently for the purpose of inducing the defendant to purchase the said business. As a fact, the vendors had made, on paper, a profit of about \$50,000 in the year 1911, and the difference between \$50,000 and \$56,000 is not of itself so great as to suggest *mala fides*; but the circumstances surrounding the transaction, to my mind, clearly indicate that the vendors knew the representation which they made as to profits was untrue and they resorted to several fraudulent artifices for the purpose of inducing the defendant to believe that it was true.

After they had conceived the design of selling, they procured a new and larger ledger; but they did not transfer to this new ledger the accounts as they stood in the old ledger. They caused to be entered in the new ledger as sales several fictitious amounts for the purpose of enlarging the volume of their sales, and they largely cut down the amounts paid to travellers for wages and expenses. At the trial they had no explanation to give for these apparently fraudulent entries. Their excuse was that their bookkeeper had done this on his own responsibility and without their knowledge. The bookkeeper swears that he made the changes on the instructions of the vendors, and I believe his story to be true. It would be inconceivable that a bookkeeper would so

manipulate his masters' books without instructions. This new ledger was shown to the defendant. The old ledger was removed by Ferris the day before the defendant came to look over the plant.

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I therefore find that the vendors represented the amount of their profits fraudulently.

As to the number of competitors, the vendors stated to the defendant in a letter that they had only one competitor in Canada. They endeavored to avoid the effect of this statement by saying that, when subsequently he came down to look over the plant, they explained to him that they had three competitors. I do not believe that any such explanation was given. Even if it were given, it was not true, as they actually had seven or eight active competitors. I cannot believe that the vendors were ignorant of the fact that they had these competitors. They had been in business during 1910 and 1911 and all of them travelled through the country. Their bookkeeper, who was only in their employ from April, 1911, to January, 1912, and who did not travel through the country, was aware of the existence of these competitors, and I think it entirely unlikely that the vendors were not also aware of it.

I think both these representations were material, and that the property was not worth as much as it would have been had these representations been true. A business with only one competitor in Canada, and which is making a profit of \$56,000 per year, is in a much better position than a business with seven or eight active competitors, and which has only a paper profit of \$50,000 a year. The defendant is entitled to a verdict on his counterclaim against the vendors for the damages he has so sustained.

There is no pretence that the plaintiff had any knowledge of the fraud perpetrated by the vendors. The defendant contends, however, that, notwithstanding, they

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C.J.

are entitled to set off against him whatever damages they are entitled to recover against the vendors.

The right of set off depends upon sub-section (f) of section 39 of The King's Bench Act, which makes an assignment of a chose in action "subject to any defence or set off" in respect of the debt or chose in action existing at the time of notice of assignment, "in the same manner and to the same extent as such defence or set off would be effectual in case there had been no assignment thereof."

The meaning of that is that an assignee is in no better position than the assignor with respect to any defence or set off which existed at the time the notice of assignment was given. The question is, could a claim for damages for deceit be pleaded as either a defence or set off by the defendant had this action been brought by Munroe Bros. & Ferris. Clearly, I think, such a claim could not be pleaded as a defence. Damages for having been fraudulently induced to enter into a contract can only be recovered because the contract is binding upon the debtor and can be enforced against him, or he elects to be bound by it. He cannot in the same breath repudiate the contract and ask for damages because he is bound by it. The two claims are inconsistent. The defendant's position is that he was induced to enter into the contract by the fraud of Munroe Bros. & Ferris; but, because of the way in which the subject matter has been dealt with, he is not now in a position to repudiate and must abide by it. The contract, therefore, stands. The defendant is not, however, without remedy. He is entitled to recover from them the damages which he has sustained by reason of the contract. This he can do not by way of defence but by way of counterclaim. It is probable that, if the defendant were in a position to repudiate the contract because of the vendors' fraud, he might set up the fraud by way of defence, even as



against a *bona fide* assignee; *Stoddart v. Union Trust, Ltd.*, [1912], 1 K.B. 181. The defendant does not, however, seek to set the transaction aside for the reasons already stated, and hence he is not in a position to avail himself of this defence.

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Then, could this claim for damages be pleaded as a "set off" as against Munroe Bros. & Ferris, were they the plaintiffs? The Act of 1 Geo. II, c. 22 (amended and made perpetual by 8 Geo. II, c. 24), which first gave the right to set off cross demands unconnected with each other, applies only where the claims of both plaintiff and defendant are liquidated: *Morley v. Inglis*, 5 Scott, 319, (1837).

In equity a set off, although it sounded in damages, was allowed where the damages arose out of a breach of the contract assigned. That was the ground of the decision in *Young v. Kitchin*, 3 Ex. D. 127, followed and affirmed in *Newfoundland v. Newfoundland*, 13 A.C. 199.

No case, however, has gone so far as to hold that damages unconnected with the contract can be set off either as against the original party or an assignee.

Section 291 of The King's Bench Act provides that a defendant in an action may set up, by way of counterclaim, against the claim of the plaintiff, any right or claim, whether the same sounds in damages or not, and in that case the Court has power, under rule 293 to set off the demands and award judgment for the balance in favor of either the plaintiff or the defendant. For all practical purposes this gives the debtor the same rights as against the original party as he would have did the law permit a set off. This right of counterclaim, however, is only against the original contractor. Section 39, s-s. (f), gives no right to counterclaim as against the assignee, but only a right of set off.

This provision gives the defendant a somewhat larger

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right than he possessed before the Judicature Acts, and also a somewhat larger right than is granted by the equivalent section of the English Judicature Act, which makes the assignment "subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not been passed." Our Act preserves to him not only all equities to which the claim assigned was subject; but also any legal set off whether connected with, or arising out of, the debt assigned or not, which he had against the assignor at the time of notice of the assignment: *Exchange Bank v. Stinson*, 33 U.C.C.P. per Osler, J.A., at 164; *Seyfang v. Mann*, 27 O.R., per Armour, C.J., 633. In other respects the two Acts are the same. Under neither can a claim for damages unconnected with the contract assigned be set off against the assignee. Such was the decision of the Court of Appeal for Manitoba in *McManus v. Wilson*, 17 M.R. 567, and the Court of Appeal in England in *Stoddart v. Union Trust*, in which latter case the precise point in question was determined against the defendant.

It was argued by counsel for the defendant that the covenant sued on is collateral to the covenant to pay in the agreement to purchase and for that reason there is a right to set off the damages claimed as against the plaintiff. I do not think the mortgage was given as a collateral security to the agreement, but in performance of it; but, even if the plaintiff were suing as assignee of the agreement itself, *Stoddart v. Union Trust* shows that the damages claimed by the defendant could not be set off against him.

I am, therefore, of opinion that the defendant has no right to set off the damages which he is entitled to recover from the vendors as against the plaintiff.

The result is that the plaintiff is entitled to recover from the defendant the full amount of his claim and

costs, and there will be judgment accordingly. The counterclaim as against him is dismissed with costs.

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The defendant is entitled to judgment upon his counterclaim against Munroe Bros. & Ferris for the difference between the price paid for the property purchased, namely \$60,000, and its real value. That is the correct measure of damages according to the decision of the Court of Appeal in *Rosen v. Lindsay*, 17 M.R. 251.

If the parties consent I will refer the question of damages to the Master. If not, I will appoint a time to take the evidence myself, unless the defendant is willing to submit the question on the evidence already in.

July 24th, 1913. His Lordship, sitting as a jury, assessed the damages and gave judgment for the defendant Johnson against Munroe Bros. & Ferris upon the counterclaim, for \$12,000 and costs of counterclaim.

## WARREN v. PETTINGILL.

### FRANK THIRD PARTY.

Before GALT, J.

*Practice—Third party procedure—Examination for discovery—Directions as to mode of determining questions between defendant and third party—King's Bench Act, Rules 249 (a), and 250 (a).*

1. A defendant, who has served a third party with notice of a claim for contribution or indemnity in respect of the plaintiff's claim, cannot proceed to examine such third party for discovery, although he has filed a defence to the notice, until after an order for directions as to the mode of determining the questions arising between all the parties has been obtained by the defendant under Rule 249 (a) of the King's Bench Act.

*Burke v. Pittman*, (1888) 12 P.R. 662; *Tritton v. Bankart*, (1887) 56 L.J. Ch. 629, and *Annual Practice*, 1913, p. 276, followed.

2. The expression "subsequent proceedings" used in sub-rule (a) of Rule 250 refers to the proceedings directed by the Court or Judge when making an order for directions under Rule 249 (a).

ARGUED: 18th September, 1913.

DECIDED: 20th September, 1913.

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**Statement.** **APPEAL** from an order made by the Referee in Chambers on the 16th day of September, 1913, ordering William Frank (the third party) to attend for examination for discovery within three days from the date of the order.

*A. G. Kemp* for third party.

*R. D. Guy* for defendant.

GALT, J. It appears that the third party was duly served by the defendant with a notice of claim for contribution in respect of the relief sought by the plaintiff against the defendant. The third party filed a defence to the notice and thereupon the defendant sought to examine him for discovery. The third party did not attend for examination and the defendant served notice of motion to strike out the third party's statement of defence. On the return of the motion the above-mentioned order was made by the Referee.

Mr. Kemp, on behalf of the third party, appeals from the order upon the ground that a defendant, who has served a third party notice on anyone, is not entitled to enforce discovery against such third party until after compliance with Rule 249 and 249 (a). The rule reads as follows:

"249. If a person, not a party to the action, served under these rules defends pursuant to the notice, the party giving the notice may apply to the Court or a Judge for directions as to the mode of having the questions in the action determined.

(a) The Court or Judge, upon the hearing of such application, may, if it shall appear desirable to do so, give to the person so served liberty to defend the action upon such terms as shall seem just, or to appear at the trial and take such part therein as may seem proper, and may direct such pleadings and documents to be delivered, or such amendments in any pleadings to be made, and generally may direct such proceedings to be taken, and give such directions, as to the Court or Judge shall appear proper, for having the questions most conveniently

determined, and with respect to the mode and extent in or to which the person so served shall be bound or made liable by the judgment in the action."

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J.

Mr. Guy, on behalf of the defendant, contends that, when a third party has filed a defence to the notice, he is in the position of a defendant, and is, therefore, immediately liable to examination for discovery under Rule 387.

Neither of the learned counsel referred to the practice in vogue in Ontario and in England. I find that Rules 249 and 249 (a) are substantially the same as Ontario Rule 213, which, in its turn, is founded upon a corresponding rule in England.

A third party permitted to defend or to take part in defending the action does not become a defendant for all purposes. See *Eden v. Weardale*, 35 Ch.D. 287.

In Ontario it has been held that a claim by a defendant against a co-defendant for indemnity will not be tried without an order under Rule 213, above-mentioned: *Burke v. Pittman*, 12 P.R. 662.

In *Tritton v. Bankart*, 56 L.J. Ch. 629, the defendant omitted to obtain the order for directions and it was held that the question between the co-defendants could not be determined upon the trial of the action.

Mr. Guy further relied upon our Rule 250 (a), which provides that:

"(a) All the rules applying to the conduct of actions where a defence is filed to a statement of claim shall apply, *mutatis mutandis*, to the subsequent proceedings between the plaintiff and defendant or defendants and any other person, or between any of them."

I think that the "subsequent proceedings" mentioned in this rule refers to the proceedings directed to be taken by the Court or Judge when making an order for directions under Rule 249 (a).

No doubt discovery may be obtained as between the

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defendant and the third party in due course, but not until after the order for directions is made: See note in the *Annual Practice*, 1913, at foot of p. 276. See also *Bates v. Burchell*, [1884] W.N. 108.

I am, therefore, of opinion that, no application for directions having been made in this case, the defendant is not yet entitled to examine the third party for discovery.

The appeal will, therefore, be allowed with costs.

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SNYDER V. MINNEDOSA POWER CO.

Before THE REFEREE.

*Practice—Amendment—Counterclaim—Puis darrein continuance—Plaintiff filing counterclaim against defendant's counterclaim—King's Bench Act, Rules 336–340.*

Under Rule 338 of the King's Bench Act, R.S.M. 1902, c. 40, a defendant may, in a proper case, be allowed to amend his counterclaim previously filed by setting up a number of causes of action for damages alleged to have arisen since the counterclaim was filed, and such amendment should be allowed if it would not put the plaintiff in such a position that he could not be compensated in costs or otherwise: *Winnipeg v. Winnipeg Electric Ry. Co.*, (1909) 19 M.R. 279.

The plaintiffs had judgment in the action for \$3600 with leave to bring another action for the balance of their claim, a large portion of which had only accrued since the commencement of the action, and they could not therefore introduce their new claim in this action by amending their statement of claim.

*Held*, that these circumstances were not such that the allowance of the amendment asked for would inflict upon the plaintiffs an injustice for which they could not be compensated, because they might either set up their new claim by way of counterclaim to the defendant's counterclaim, at least to the extent of a full set off to the latter, under *Toke v. Andrews*, (1882) 8 Q.B.D. 428, and *Renton Gibbs & Co. v. Neville & Co.*, [1900] 2 Q.B. 181, or they might commence a new action and then move to consolidate the two actions or have them tried together or for such other relief as would prevent the defendants from enforcing any judgment for damages in their action pending the result of the new action if diligently prosecuted.

ARGUED: 30th September, 1913.

DECIDED: 6th October, 1913.

MOTION by the defendant Company for leave to amend its counterclaim filed in November, 1911, by setting up a number of causes of action for damages alleged to have arisen since the counterclaim was filed. It was stated that it was only within the last week or two that the defendants were able to estimate the damages they claimed, because the amount depended largely upon the cost of certain work done by them which they claimed the plaintiffs should have done and which had only recently been completed. 1913  
Statement.

Defendants claimed that such damages amounted to about \$15,000.

*J. W. E. Armstrong* for plaintiffs.

*F. M. Burbidge* for defendants.

THE REFEREE. Plaintiffs say that they have a claim against the defendants for a large amount over and above the judgment for \$3,600 already entered in this action, and say that they intend to commence an action to recover such additional amount in pursuance of the terms of the said judgment.

The defendants should only be permitted to amend their counterclaim by including everything down to date, if this would not cause any injustice to the plaintiffs for which they could not be compensated in costs or otherwise: *Winnipeg v. Winnipeg Electric Ry. Co.*, 19 M.R. 279.

As plaintiffs' additional claim is for work done under the same contract under which the defendants claim their damages, *Toke v. Andrews*, 8 Q.B.D. 428, is authority for the proposition that they might set it up by way of counterclaim to the defendants' counterclaim, although it would appear from *Renton Gibbs & Co. v. Neville & Co.*, [1900] 2 Q.B. 181, that it would be questionable whether the plaintiffs could do more than set it up as a shield against the defendants' counterclaim, and possibly the plaintiffs could not in this action recover

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any excess in respect of their counterclaim over and above what might be awarded to the defendants on theirs.

The plaintiffs cannot in this action introduce their new claim by amending their statement of claim, both because it accrued since the commencement of the action and because judgment has been entered already for plaintiffs for \$3,600, reserving, however, their right to sue for any additional amount to which they claim to be entitled.

I cannot see that the allowance of the amendments will put the plaintiffs in such a position that they must necessarily suffer injustice. If they are not satisfied to set up their additional claim as a shield merely against the defendants' counterclaim, it is open to them to bring a new action for it, and then move to consolidate the two actions or have them tried together or for such other relief as a Judge would no doubt grant them to prevent the defendants from enforcing any judgment for damages pending the result of the new action if diligently prosecuted.

An order will go allowing the amendments asked for if made within one week. Plaintiffs to have one week afterwards to reply.

Costs of the application to be costs in the cause to the plaintiffs. Costs occasioned by the amendments to be costs to plaintiffs in any event.

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## PITURA V. HANEY.

1913

Before GALT, J.

*Practice—Pleading—When action at issue—Amendment of pleading—King's Bench Act, Rule 301—Notice of trial.*

*Held*, by the Referee, following *Brown v. Telegram Printing Co.*, (1910) 21 M.R. 775, that, if the plaintiff amends his statement of claim after the action is at issue and before notice of trial, he opens up the pleadings and is not entitled to give notice of trial until after the lapse of ten days from the time of such amendment or from the time of the filing of an amended defence if such is filed within the eight days allowed.

On appeal to a Judge in Chambers,

*He'd*, that it could not be said that the Referee was wrong in the view he took of what was decided by the Court of Appeal in *Brown v. Telegram Printing Co.*

ARGUED: 19th October, 1913.

DECIDED: 6th November, 1913.

THIS was an appeal from an order made by the Referee striking out notice of trial for the then approaching jury sittings to be held at Winnipeg commencing November 4th, 1913. The statement of claim was filed on May 17th, statement of defence on June 15th; on the 13th October the statement of claim was amended pursuant to an order made in that behalf, and on 21st October an amended defence was delivered. Notice of trial was given by the plaintiff on the following day, October 22nd. The Referee held that the notice of trial was invalid as the cause was not at issue under the judgment pronounced by the Court of Appeal in *Brown v. Telegram Printing Co.*, 21 M.R. 775. Statement.

*F. Heap* for plaintiff.

*E. Frith* for defendant.

GALT, J. The report of the above decision is meagre and unsatisfactory. The dates of filing the original pleadings are not given, and no attempt is made to state upon what ground, or grounds, the Court of Appeal based its judgment. The following is the head-note:

"When the statement of defence has been amended an action is not at issue under Rule 301 of the King's

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—  
GALT,  
J.

Bench Act until the expiration of ten days from the delivery of the amended statement of defence and an application for a special jury may, under section 60 of the Jury Act, be made within six days after the expiration of such ten days."

I gathered from statements of counsel that in *Brown v. Telegram* the defendant had filed a defence during the month of July, 1910.

Under Rule 205A,

"Any defendant whose time for filing a statement of defence expires in a vacation and who files a statement of defence within such time, shall be at liberty, within eight days immediately following such vacation, to file an amended statement of defence and counterclaim, or either, and the plaintiff shall have the right of reply thereto within eight days after the service of the defendant's amended pleading."

The cause was apparently at issue before the expiration of the long vacation, subject to the right which the defendant had under the above rule until September 23rd to file an amended statement of defence and counterclaim. He did not do this within the time, but delivered an amended defence on September 29th. The report does not show whether this was by consent or pursuant to an order.

Rule 301 provides that the action should be at issue at the expiration of ten days from the delivery of the last pleading. It does not say anything about the last amended pleading.

I have always been under the impression that, when a cause is once at issue, the plaintiff is entitled to carry his case down to trial at any jury or non-jury sittings without regard to any amendments which may be granted on application by either party thereafter. It is common practice to serve a notice of motion for leave to amend pleadings at the sittings for which notice of trial has already been given, and I never heard it suggested that

any such statement would render the notice of trial or the trial itself nugatory.

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J.

In the present case the cause was at issue in June, and I should not have supposed that the amendments made under order in October could have the effect of rendering the cause not at issue. At the same time, I am unable to say that the Referee was wrong in the view he took of what was decided by the Court of Appeal in *Brown v. The Telegram*.

I must, therefore, dismiss this appeal, but, under the peculiar circumstances, I do so without costs.

### ARENOWSKY V. VEITCH.

Before MATHERS, C.J.K.B.

*Demurrer—Argument of, before trial—King's Bench Act, Rule 453—Charge of conspiracy—Public officer—Liability of, for acts done in discharge of his duties as such.*

The statement of claim charged, amongst other matters, that the defendants, including Johnston, the Chief License Inspector for the Province, had conspired together to deprive the plaintiff of the benefit of his application for a license under the Liquor License Act, and of the moneys paid by him in respect thereof, and that Johnston had connived at, and assisted his co-defendants in wrongfully procuring the issue of a license to the defendant Company under the plaintiff's application and in taking the benefit of the plaintiff's application and of money paid by him in respect thereof.

The defendant Johnston demurred on the grounds:

- (a) That he had no power to procure such license.
- (b) That no legal liability is imposed on him in the discharge of his duties as Chief License Inspector.

*Held*, that the complaints against Johnston raised issues of fact, not of law, that the special grounds of his demurrer were not supported by the pleadings, and that his application for an order, under Rule 453 of the King's Bench Act, providing for the determining of questions of law before the trial of the action, should be dismissed with costs.

*Gardiner v. Bickley*, (1905) 15 M.R. 354, followed.

ARGUED: 15th October, 1913.

DECIDED: 21st October, 1913.

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Statement. APPLICATION by the defendant Johnston, under Rule 453, for an order that a question of law said to be raised by his defence be disposed of before the trial of the action.

*A. B. Hudson* for plaintiff.

*H. W. Whitla, K.C.*, for defendant Johnston.

MATHERS, C.J.K.B. It was held by Mr. Justice Perdue in *Gardiner v. Bickley*, 15 M.R. 354, that such an order should not be made unless the determination of the question of law so raised would dispose of the action or at least decide some important principle involved in the action. The same rule ought to apply where there is a demurrer by one out of several defendants. If the demurring defendant occupies a distinctive position and a decision sustaining the demurrer would eliminate him from the action, in the absence of special reasons to the contrary, his demurrer ought to be disposed of without waiting for the trial of the action as against the other defendants.

The statement of claim is not clearly expressed but it may be paraphrased as follows: The plaintiff applied to the defendant Veitch to assist him in procuring a wholesale liquor license in the town of Transcona. Veitch represented that he was able to procure such a license for the plaintiff and agreed to do so for a payment of \$5,000, or half the profits to be made in the business. The plaintiff agreed to Veitch's terms, provided the license granted was the only one of the kind issued in Transcona. The plaintiff, at Veitch's suggestion, made his application in the name of The Transcona Wine and Spirit Company. He procured the signatures of the necessary householders and paid the necessary disbursements to or through the defendant Fisher, who was employed as solicitor for both Veitch and the plaintiff. Subsequently a license was granted to parties named Currie & O'Donohue.

It is then alleged that the defendant Lennox, acting on behalf of Veitch, told the plaintiff that a license had been

granted to him in the Company name before mentioned, and asked for payment of the \$5,000 promised, but that the plaintiff refused because of the license issued to Currie & O'Donohue and that he also refused to comply with Lennox's request that he sell the license said to have been granted to him and divide the profit made on the sale with Veitch.

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The statement of claim then continues:

Paragraph 13. "The defendant Veitch thereupon conceived the fraudulent scheme or design of depriving the plaintiff of the benefit of his said application for license and of the said license and to obtain the said license and all benefits therefrom for himself and his co-defendants and the said defendant Veitch and his co-defendants, other than the defendant Company, conspired together for the purpose of depriving the plaintiff of the benefit of his said application for license and of the moneys paid by the plaintiff in respect thereof and in furtherance of the said design the defendants Veitch, Lennox and Stott caused an application to be made for a charter under The Joint Stock Companies Act of Manitoba for a company to carry on a wholesale liquor business under the name of The Transcona Wine and Spirit Company and procured the said charter, the shareholders being nominees of the said above-mentioned defendants except the said Stott, who was himself one of the incorporators."

Paragraph 14. "The said defendants Veitch, Lennox, Fisher and Stott, with the connivance and assistance of the defendant Johnston, who is the Chief License Inspector for the Province of Manitoba, wrongfully procured a license to be granted to the said defendant Company so incorporated by his co-individual defendants and in procuring the said license took the benefit of the application of the plaintiff and of the moneys procured and paid by the plaintiff to the defendant Fisher."

Paragraph 15. "The individual defendants have since sold the stock held by them in the defendant Company, or a portion thereof, or the assets of the said Company, for a large sum of money and have deprived the plaintiff of the benefit of his application for license and of the moneys paid by him in respect thereof."

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—  
MATHERS,  
C.J.

Paragraph 16. "The plaintiff demanded of the defendants payment to him of the said moneys so expended by him and also one half of any profits derived from the sale of the said license and the said business conducted by the defendant Company but the individual defendants neglected and refused to pay the same."

Paragraph 18. "By reason of the fraudulent conspiracy and acts of the defendants as aforesaid the plaintiff has been prevented from obtaining the issue of the said license and has suffered great loss and damage and has been delayed in the prosecution of his business."

"And the plaintiff claims damages in the sum of ten thousand dollars."

The defendant Johnston demurs to the statement of claim on the ground,—

(a) "That this defendant has no power to procure a license to be granted to the above Company or at all under the provisions of the Liquor License Act of the Province of Manitoba, and,

(b) That no legal liability is imposed on this defendant in the discharge of his duties as License Inspector for the Province of Manitoba as alleged."

It is not easy to make out what paragraphs 13 and 14 mean; but it seems to me that paragraph 13 amounts to this: That the defendants other than the Company (which of course includes the defendant Johnston) conspired together for the purpose of depriving the plaintiff of the benefit of his application for license and the moneys paid by the plaintiff in respect thereof. That I think is as far as it affects the defendant Johnston. It goes on to allege that in furtherance of the design Veitch, Lennox and Stott procured a charter for a Company, Veitch and Lennox being represented as shareholders by nominees and the defendant Stott being himself one of the incorporators.

The effect of paragraph 14 is that Veitch, Lennox, Fisher and Stott wrongfully procured a license to be granted to this Company and thereby took the benefit of the plaintiff's application and of the moneys paid by

the plaintiff and that they did this with the connivance and assistance of the defendant Johnston.

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Paragraphs 15 and 16, I think, may be left out of consideration. Paragraph 15 alleges a sale of the stock in the Company by the individual defendants, but there being no allegation that Johnston owned any of the stock in the Company, that paragraph cannot affect him. The same may be said of paragraph 16. There is no allegation that any moneys were paid to Johnston and therefore a demand upon him for repayment would constitute no cause of action against him.

Paragraph 18, however, includes the defendant Johnston. Paragraph 13, as I have already pointed out, alleged a conspiracy by Johnston with the other defendants, to do an unlawful act. Paragraph 14 alleges the performance of this unlawful purpose, with the connivance and assistance of Johnston, and paragraph 18 says that by reason of the fraudulent conspiracy and acts the plaintiff has suffered damage.

There are no accessories in tort, so that if an unlawful act was performed by Veitch, Lennox, Fisher and Stott, and Johnston assisted in that unlawful act, he would be equally liable with them as a principal.

Whether or not Johnston did conspire with the other defendants as alleged, and whether or not he assisted them in carrying out the conspiracy to the damage of the plaintiff, are questions of fact, not questions of law. For the purposes of this application I must assume that these allegations are true. The special grounds of demurrer stated in Johnston's defence do not appear to me to be raised in the pleadings at all. It is not alleged that Johnston procured a license to be granted to the Company, but that he assisted his co-individual defendants in procuring it. As to the second ground, it will probably be conceded that for acts done in the proper discharge of his public duties he incurs no

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liability; but the allegation is of acts and conduct entirely beyond the scope of such duties. For unlawful acts so performed he enjoys no greater immunity than any other citizen.

The application must be refused with costs in the cause to the plaintiff in any event.

### WATSON V. CADWALLADER.

Before GALT, J.

*Parties to action—Adding parties in the Master's office—Vendor and purchaser—Foreclosure of agreement for sale—Action by vendor to remove caveat filed by assignee of interest of sub-purchaser in the land—Motion for judgment—King's Bench Act, Rule 40.*

Plaintiff sold the land in question under agreement of sale to defendant C. C sold to McIntosh and Burdick and Burdick assigned his interest in the land to defendant Bray as security for money borrowed. Bray filed a caveat to protect his interest as lender. Plaintiff then commenced this action for foreclosure of his agreement of sale to C and for the removal of defendant Bray's caveat.

*Held*, that McIntosh and Burdick were necessary parties to the action and that, in their absence, the plaintiff could not have final judgment, under Rules 615 and 616 of the King's Bench Act, against Bray upon admissions in the pleadings or in the examinations of the parties.

It would not be sufficient to add the sub-purchasers as parties in the Master's office under Rule 40 of the Act, because no direct relief can be had against parties so added and they could not themselves get any relief against co-defendants beyond what is claimed by the plaintiff: *Holmsted & Langton*, 3rd ed. p. 867.

*Campbell v. Imperial Loan Co.*, (1905) 15 M.R. 614, and *Sveinsson v. Jenkins*, (1911) 21 M.R. 746, followed.

ARGUED: 12th November, 1913.

DECIDED: 14th November, 1913.

**Statement.** Motion for judgment pursuant to an order made by the Referee. Both defendants oppose the motion. The action was brought by the plaintiff as vendor against the defendant Cadwallader as purchaser, and Herdis Bray as assignee of an interest in the land.



*A. W. Morley* for plaintiff.

*A. C. Ferguson* for defendant Cadwallader.

*W. W. Kennedy* for Bray.

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—  
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GALT, J. The plaintiff states in his statement of claim that the defendant Bray claims to have an interest in the lands in question and has filed a caveat under The Real Property Act against the said lands in the Land Titles Office for the District of Winnipeg, which said caveat appears on the register of the Land Titles Office against the lands as No. 70022, and claims to hold said interest by, through or under, the defendant Cadwallader.

The plaintiff claims payment by the defendant Cadwallader, and in default that the defendants may be foreclosed.

The defendant Bray, in her statement of defence, sets up that by agreement in writing and under seal, bearing date April 26th, 1911, the defendant Cadwallader sold the land above described to James D. McIntosh and Herbert W. Burdick, of Winnipeg, for the sum of \$4,500, payable as in the said agreement set out, and the defendant Bray says that the said James D. McIntosh and Herbert W. Burdick should be made parties to this action.

The defendant Bray further says that she advanced large sums of money to the said Herbert W. Burdick upon the security of the interest of the said Burdick in the said lands, and that by agreement under seal said Burdick assigned to the defendant Bray all his interest in the lands hereinbefore described as security for said indebtedness and that such indebtedness is still outstanding to the extent of \$1,150 and interest.

The statement of claim was issued on the 21st August, 1913.

It would appear from the above statement of facts that

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the interests of McIntosh and Burdick accrued prior to the commencement of this action and it was admitted by counsel that their interests appeared on the caveat filed by the defendant Bray.

Under such circumstances, it appears to me that these parties McIntosh and Burdick should have been made original defendants to the statement of claim and should have been given an opportunity of claiming relief over, if necessary, against the plaintiff or defendants, as they might be advised.

It was suggested by counsel for the plaintiff that these parties might be added in the Master's Office, but no direct relief can be had against parties added in the Master's Office and they cannot be required to account. It would also seem that they cannot themselves get any relief against co-defendants beyond what is claimed by the plaintiff. See *Holmsted & Langton*, 2nd ed., p. 823. See also *Campbell v. Imperial Loan Co.*, 15 M.R. 614, and *Sveinsson v. Jenkins*, 21 M.R. 746.

For this reason I must decline to enter final judgment against the defendant Bray, and must dismiss this motion, with leave to the plaintiff to add McIntosh and Burdick as parties defendant, and take such further proceedings as they may be advised.

The motion will be dismissed with costs to defendant Bray in any event.

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## RE FREEDY DECEASED.

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Before PRENDERGAST, J.

*Will*—Absolute gift of whole estate to widow followed by authority to executors to dispose of it, and in the meantime "to manage it for the best advantage of my heirs"—Repugnant clauses—Devolution of Estates Act, R.S.M. 1902, c. 48, s. 22—Meaning of word "heirs."

1. An absolute gift by a testator of all his real and personal estate to his widow will not be cut down by a subsequent clause authorizing his executors "to dispose of it at any time which they shall deem most advantageous and, until such time, to manage it for the best advantage of my heirs", although the deceased left a child as well as the widow surviving him.

The rule that, when there are two inconsistent clauses in a will, the later clause revokes the previous one is subject to the qualification that it must be reasonably clear that the testator intended to revoke the prior gift.

*Re Farrell*, (1912) 4 D.L.R. 760; *Adshead v. Willetts*, (1861) 9 W.R. 405; *Kiver v. Oldfield*, (1859) 4 De G. & J. 30, followed.

2. In section 22 of the Devolution of Estates Act, R.S.M. 1902, c. 48, which defines the expressions "heirs", "heirs and assigns", &c., when used "in any instrument to which the deceased was a party or in which he was interested", the word "instrument" was not meant to include wills, and the word "heirs" used in the will was not necessarily intended to refer to the infant and should be interpreted as indicating the widow as the person entitled to the estate or made by the will "heir" to it, to avoid defeating the intention of the testator to leave all to the widow clearly expressed in the preceding clause.
3. It having been shown that all the debts of the estate had been paid, except a mortgage on a parcel of real estate, the executors should convey all the estate to the devisee, notwithstanding the discretion apparently given to them to postpone disposing of it, subject to the widow making a satisfactory arrangement to protect them from any claim on the mortgage.

*Re Hamilton*, (1912) 8 D.L.R. 529, followed.

ARGUED: 14th May, 1913.

DECIDED: 11th September, 1913.

APPLICATION by the executors of the will of Louis Freedy, deceased, under Rule 994 of the King's Bench Act, to have certain questions determined with respect to the proper construction of two clauses of the said will.

Statement.

*L. J. Elliott* for executors.

*A. C. Ferguson* for the widow.

*A. Sullivan* for infants.

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PRENDERGAST, J. The material in support establishes that the said deceased left surviving him a widow and one child now five years old, that all the debts have been paid, that there is of real estate only one quarter-section of land which is mortgaged, and that the executors are unable at the present time to sell the property at what they would consider a reasonable price.

The two clauses in question are as follows:

*"I give, devise and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say: To my beloved wife, Jennie Freedy, of the Post Office of Dry River, in the Province of Manitoba.*

"I hereby authorize my executors to dispose of my real and personal estate at any time which they shall deem most advantageous, and until such time as they shall dispose of it to manage it for the best advantage of my heirs."

I should add that these two clauses are immediately followed by another one in these terms:

*"All the residue of my estate not hereinbefore disposed of I give, devise and bequeath . . . . ."*

The will is on a printed form, the words italicized hereinabove being printed and the others hand-written in the will, and the last clause (that with respect to the residue), contains only the printed words of the form and was left uncompleted as shown.

The object of the petition is in a general way to have determined: first, what interest the widow and the child respectively take in the real and personal property and in the income derived therefrom; and second, what disposition the executors should make of the property—sell it, hold it or transfer it to the widow.

There has been a written memorandum of argument put in by counsel for the widow, and I may say that I

agree not only with the conclusion it reaches that she takes all, but also with the trend of the reasons advanced in support of that view, except that I would say that, in section 22 of The Devolution of Estates Act, which defines the expressions "heirs," "heirs and assigns," etc., in "an instrument to which a decedent was a party or in which he was interested," the word "instrument" was not meant to include wills.

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There can be but the one view taken of the first clause submitted, and that is that, as far as it goes, the gift to the widow of all the testator's property both real and personal is absolute, and the words used are as direct and unambiguous as they could possibly be.

This is moreover strengthened, if it can possibly be so, by the fact that the testator did not make use of the residue clause but left it blank, although the scheme of the printed form which he adopted clearly suggested that here was the proper place to dispose of anything not already disposed of in the preceding parts of the will.

There is, however, the other clause which has occasioned the present application.

It is to be first noted that, whatever may be its effect, this clause does not—differing from the first clause in this essential respect—contain any express words of gift, devise or bequest. So that all that could be urged in support of the view that it purports to give something to somebody else than the widow must be at best a matter of implication. But the rule that, where there are two inconsistent clauses in a will, the later clause revokes the previous one, is subject to the qualification that the implication be a necessary implication and that it be reasonably clear that the testator intended to revoke the prior gift: In *Re Farrell*, 4 D. L. R. 760.

The first part of the clause does not raise any question. It is clear. It merely authorizes the executors "to dispose of my real and personal estate at any time which they

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shall deem most advantageous." The difficulty, if any, lies in the construction of the following words: "and until such time as they shall dispose of it to manage it for the best advantage of my heirs"—the words "manage" and "heirs" calling particularly for consideration.

This phrase, as already observed of the whole clause, contains no words of express gift, so that its effect as such must be implied. But a gift of what? Assuming that the word "heirs" means the infant, is it a gift of the real and personal estate or of the rents and profits derived therefrom? If a gift of the rents and profits only, it would be a most precarious gift indeed, as the executors could cut it out by disposing of the real and personal estate at any time, within a month perhaps of the testator's death. But neither does the phrase as a whole, nor the word "manage," necessarily suggest rents or other revenue. The word "manage" may mean as well, to hold in a state of preservation, to keep harmless, to save from deterioration. Reading it in this sense with the context "for the best advantage of my heirs," it would then amount to a gift of the whole estate to the infant. But that would mean, on the strength of the loosest implication, based moreover on an ambiguous term, the total revocation of the direct gift to the wife, which is expressed in the clearest terms known both in common language and legal terminology.

Where an absolute interest is given by a will, it will not be cut down except by distinct words: *Adshead v. Willetts*, 9 W. R. 405.

An absolute gift in clear language in a will is not taken away unless by language equally clear: *Kiver v. Oldfield*, 4 De G. & J. 30.

See also *Williams on Executors*, pp. 125 and 831.

But the use of the word "heirs" is not always limited to its technical sense.

It is commonly used by laymen to indicate persons

entitled by will or otherwise to share in the estates of decedents, and may be regarded as a synonym of "legatee": *Graham v. De Yampert*, 17 South. Rep. 355.

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Popularly, the term often includes devisees, the persons who are made heirs; *heredes facti*: *Clark v. Scott*, 67 Pa. 446.

Where the effect of interpreting "heirs" as meaning "children or heirs of the body" would be to defeat the clearly expressed intention of the testator and to reduce an express gift in fee simple to a lesser estate, the Court should hardly feel authorized to do so: *Walsh v. McCutcheon*, 41 Atl. Rep. 813. Here the gift in fee simple would not only be reduced but annihilated.

Viewed in the light of this construction, the clause does not conflict with the absolute gift of the whole estate to the wife. It simply means, which would be the executors' duty even without that clause, that they should handle the estate until the debts are satisfied.

As to the other question concerning the rights of the executors to retain the property, this at most is a discretionary power, as shown not only by the general tenor of the will but also by the use of the word "authorize," which of course implies no direction. The executors should convey the property to the devisee, as was held by Boyd, C., of the High Court of Ontario, in *Re Hamilton*, 8 D.L.R. 529.

In that case a testator by his will had given a share of his estate to his daughter on her attaining twenty-one, with a proviso that, if the trustees should think it undesirable for any reason that such share should be paid, they could defer the payment of the whole or any part to such time as they should think best, and in the meantime pay only the annual revenue; and the Court held that the daughter had a present right on attaining twenty-one years to payment in full of the corpus, ignoring the discretionary power granted to the trustees, the

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law being well settled that, where a sum is given absolutely, there cannot be coupled with it a direction that a trustee of the money is to exercise a discretion as to the time or manner of payment.

I would then answer the questions submitted as follows:

As to question (a): The widow takes the whole of the real and personal property and the infant no part thereof.

As to question (b): The widow is entitled to have the land transferred to her forthwith, provided she makes satisfactory arrangements to have the mortgagee look to this land or to her for payment of the mortgage debt.

As to question (c): The executors should not retain the title to or manage the property itself, if the widow arranges about the mortgage.

As to question (d): The infant is not entitled to any share of the income, rents or profits from the real estate, but the whole thereof in the hands of the executors goes to the widow.

As to question (e): The executors, instead of selling the real property, should convey it to the devisee, provided she makes arrangements with regard to the mortgage as above stated; and if all the debts are paid, as the material in support of the application seems to establish, the personal property should also be turned over to her.

All the parties who have appeared on the application to have their costs paid out of the estate.



## FISHER V. KOWSLOWSKI.

1913

Before PRENDERGAST, J.

*Fraudulent conveyance—Intent to defraud—Insolvency—Plaintiff suing for tort—Creditor—13 Eliz., c. 5.*

1. When valuable consideration has been given for a conveyance of property by the debtor to a purchaser, the conveyance will not be set aside as fraudulent under the Statute of Elizabeth without clear evidence of an actual intent to defraud.

*Molson Bank v. Haller*, (1890) 18 S.C.R. 88, and *Hickerson v. Parrington*, (1891) 18 A.R. 635, followed.

2. A plaintiff suing for a tort, such as slander or malicious prosecution, is not a creditor of the defendant until he has recovered judgment in the action, and has no status to impeach a conveyance as fraudulent against him, even though it was made because of the threatened action. *Gurofski v. Harris*, (1896) 27 O.R. 201; *Cameron v. Cusack*, (1890) 17 A.R. 489, and *Ashley v. Brown*, (1890) 17 A.R. 500, followed.

In this case, the trial Judge held, upon the evidence, that the purchaser had given valuable and sufficient consideration for the conveyance impeached, that neither insolvency of the transferor, nor intent to defraud, nor notice to the purchaser of the existence of a debt had been proved, and dismissed the action with costs.

ARGUED: 12th June, 1913.

DECIDED: 27th September, 1913.

THE plaintiff in this case was the assignee of two **Statement.** judgments recovered in this court on July 4th, 1912, against the defendant John Kowslowski, the one for \$660.15 in favor of Myron Mandziuk and the other for \$669.50 in favor of Pietro Dutka, of which certificates were registered in the Land Titles Office on August 7th, 1912, and he brought this action to have set aside as fraudulent and void a transfer of a certain lot, dated 21st June, 1912, from John Kowslowski to Martin Kowslowski, as also an assignment of same date from the same to the same of an agreement for sale of the same lot wherein John Kowslowski was vendor and one Antonovitch the purchaser.

The defence denied fraud, collusion and conspiracy, and set forth that Martin Kowslowski gave value for the first transfer and assignment in the sum of \$2,000, partly in cash and partly in work performed and

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Statement. house on another lot for John Kowslowski.

*A. E. Bowles* for plaintiff.

*F. M. Burbidge* for defendant.

PRENDERGAST, J. I should state at once that John Kowslowski, having in November, 1911, laid a charge for attempted arson against Mandziuk and Dutka, the Grand Jury at the following assizes, held March 6th, 1912, returned "No bill" on the indictment presented, and that on the 16th of the same month Mandziuk and Dutka instituted against John Kowslowski actions for malicious prosecution, in which they respectively recovered judgment as aforesaid.

Martin Kowslowski's evidence is to the following effect. He says that on March 13th, 1912, he agreed with his brother John to build a house for him for \$2200 on a lot on Manitoba Avenue in this City. He has a note of that agreement signed by John Kowslowski in a memorandum book which he produced. The understanding was that John should give him as much money as he could raise by way of mortgage on the property and pay him the balance out of such moneys as he might then have; if necessary, he would sell for that purpose an agreement for sale which he had as vendor with one Antonovitch as purchaser with respect to a lot on Grove Street. Martin went on with the work. Sometime in May or June John procured a loan of \$1,000 on the property from the Imperial Canadian Trust Company, Martin giving at the same time a waiver of lien to the company. The books of the Company show that all of that \$1,000 went to the firms supplying material on the building, except a balance of \$28.75 which was paid to John. That left (not taking into account this last small item) the sum of \$1200 still owing to Martin. By that time, however, John had realized that he could not sell the Antonovitch agreement with advantage, and Martin was

considering taking it over himself. The Loan Company had also in the interval found out that there was still due on the Manitoba Avenue property a balance of \$350 on the purchase price, and Martin paid that out to the Company for John, which raised the latter's indebtedness to him to \$1550.

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It was quite satisfactorily shown by the evidence of Mike and John Stepanofsky and that of a clerk in a banking house, how Martin Kowslowski raised that amount, and this payment was moreover admitted.

Then, John Kowslowski having reported to Martin that he could not get more than \$1800 for the Antonovitch agreement which was for \$2650, Martin agreed to take it at \$2,000. This left a balance of \$450 coming to John, which Martin says he paid him, and he produced in court a receipt for the amount (Exhibit 8). The \$2650 under the Antonovitch agreement being payable in ten semi-annual instalments and bearing only six per cent. interest, the sum of \$2,000, which was paid by Martin for the assignment of it, does not appear to have been at all events startlingly inadequate. Nor is the fact that the consideration for the assignment is stated therein as \$2,650 instead of \$2,000 as it really was, evidence of his intention to deceive, as the solicitor who prepared the same stated that it is the practice, in discounting agreements for sale, to state as the consideration the full amount due thereunder.

As to how Martin procured the \$450, I do not see that there is any reason to doubt his statement that he was receiving money from other houses he was building on Gallagher and Selkirk Streets for parties whom he named.

Counsel for the plaintiff laid stress on the fact that John Kowslowski received the small balance of \$28.75 left on the loan after the material men were paid, and no explanation for this was in fact given. There were

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also one or two minor points which perhaps do not quite well fit in. But these seem to be negligible as of secondary importance.

In my opinion, taking it as a whole, the evidence of Martin Kowslowski, a man with but very little education, and who was submitted to searching cross-examination, was reasonable and given with satisfactory demeanour, and I take it to be quite sufficiently established that he has given full value for what he has received from his co-defendant.

With reference to notice, I would observe that the agreement between the two Kowslowskis for the building of the house on the Manitoba Avenue property was made March 13th, that even at that time the disposing of the Antonovitch agreement by John Kowslowski was contemplated at least as a contingency, and that Martin proceeded at once with the work. Of course, I am quite sure that Martin Kowslowski knew then that the indictment against Mandziuk and Dutka had been thrown out a few days before by the Grand Jury. But surely that does not imply that he knew that these parties had a claim against his brother for malicious prosecution. Then, it was only some days after that that they instituted proceedings, and as long as three months later that the cases were brought to trial and that they secured judgment. As to the notice sent by mail to Martin, receipt of which is disputed, it was only sent in August.

But in view of my other findings, I do not think this question of notice is material.

There is, moreover, really no evidence of the insolvency of John Kowslowski. But, assuming that there is and that Martin had notice, this is not sufficient in itself to cause the transfer to be set aside as a fraudulent preference: *Molson Bank v. Halter*, 18 S.C.R. 88.

Where valuable consideration has been given, there

must be clear evidence of actual intent to defraud:  
*Hickerson v. Parrington*, 18 A.R. 635.

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J.

In this last case, Burton, J.A., said, page 637:

"As I have already said in another case, quoting from Sir George Turner in *Harman v. Richards*, 10 Hare, 81, that, although a deed even if made for valuable consideration may be affected by *mala fides*, those who undertake to impeach such a transaction on that ground have a task of great difficulty to discharge."

I would also observe that the abandonment of his lien by Martin Kowslowski is even a more important element in the case than his advances of money: *Mulcahy v. Archibald*, 28 S.C.R. 523.

The case in short seems to be such a one as is referred to in *Kerr on Fraud and Mistake*, p. 202, in the following terms:

"Though there may be circumstances in the case which might lead to the presumption that the settlement was made to defeat creditors, yet, when the circumstances come to be explained and established, it may be clear that no such intent existed in the mind of either of the parties to the transaction,"—and he refers to a *dictum* of Lord Chelmsford in *Thompson v. Webster*, 4 L.T. 750, and to *Re Holland*, [1902] 2 Ch. 360.

Then, were Mandziuk and Dutka creditors? I think that the dates which I have given, with respect to notice, of the material events in their sequence, show that they were not creditors at the time of the conveyance impugned. Of course, they had a claim, but even then of a class where the results are generally doubtful, particularly so in such cases as this one where the fact of Mandziuk and Dutka being acquitted still left altogether untouched the question of reasonable and probable cause.

In *Gurofski v. Harris*, 27 O.R. 201, where a conveyance of land was made by a father to his daughter in satisfaction of a *bona fide* pre-existing debt and there

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was pending at the time an action of slander against the father, of which the daughter was aware, Boyd, C., said:

"The attack being under the statute of Elizabeth by one who became a creditor by reason of the judgment obtained in her action of slander three months after the conveyance, and there being no other creditors, it is shown by the case of *Cameron v. Cusack*, 17 A.R. 489, that the preferring of one creditor, even though there be an impending action for tort of which both are aware, is no ground for displacing the transaction as fraudulent and void. As there was a debt between father and daughter, and the conveyance was in satisfaction of that debt, I take it that the plaintiff is out of court."

The case of *Ashley v. Brown*, 17 A.R. 500, was under the Assignments and Preferences Act, but the same principle was there upheld.

I am of opinion that, even if only on this last ground, the plaintiff cannot succeed.

The action will be dismissed with costs.

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### SILKIRK LAND & INVESTMENT CO. v. ROBINSON.

Before PRENDERGAST, J.

*Vendor and purchaser—Specific performance—Rectification of agreement—Statute of Frauds—Principal and agent—Agreement of sale of land—Formal contract contemplated but not executed—Description of land—Parol evidence.*

The defendant verbally agreed to sell to one Reese, the plaintiff's agent, half of a certain described lot, and gave Reese a receipt for \$25 paid as a deposit on the purchase. The receipt erroneously referred to the property as the west half instead of the east half of the lot, as the defendant supposed at the time that it was the west half that he had bought a short time before. Then followed correspondence between the parties or their solicitors respecting the execution of a formal agreement of sale of the property which had been prepared with a corrected description of the land. This was never executed because the defendant repudiated the sale and returned the deposit, alleging as his reasons the absence of the person from whom he had bought and the consequent delay in making title.

- Held**, (1) Although the parties contemplated the signature of a more formal agreement, the defendant was bound by his receipt as there was no understanding between the parties that they were not to be bound until the execution of a formal agreement.
- (2) The plaintiffs could enforce the contract with their agent, though only his name had been used in the receipt and draft agreement of sale: *Filby v. Hounsell*, [1896] 2 Ch. 737.
- (3) The defendant was not justified in refusing to complete the sale because the plaintiffs' solicitors had objected to an acceleration clause being inserted in the proposed agreement as there was nothing in the receipt referring to such a clause and, moreover, the defendant had given quite different reasons for his withdrawal.
- (4) The receipt, taken along with the subsequent correspondence and the draft agreement fully set out in the judgment below, constituted a sufficient memorandum in writing to satisfy the Statute of Frauds although the number of the registered plan was, by error, set down as "33" instead of "386" in the draft agreement.
- (5) The receipt alone, although it only described the property as part of "Lot 2, Block 23, being 25 feet on Marion St." was a sufficient memorandum under the Statute, and the description of the land was sufficient as the defendant had identified it fully in his examination for discovery, parol evidence being admissible in such a case.
- McMurray v. Spicer*, (1868) L.R. 5 Eq. 527; *Owen v. Thomas*, (1834) 3 My. & K. 353, and *Heath v. Sanford*, (1907) 17 M.R., per Dubuc, C.J., at p. 103, followed.
- (6) The contract should be rectified so as to make the description of the land correct and specific performance decreed.

ARGUED: 10th June, 1913.

DECIDED: 23rd September, 1913.

ACTION for rectification of two agreements for sale with respect to the same piece of land, the one immediately following the other in the chain of title claimed for the plaintiffs, and for specific performance of the last one as rectified. Statement.

*C. P. Fullerton, K.C.*, for plaintiffs.

*A. B. Hudson and J. Mondor* for defendant.

PRENDERGAST, J. In the early summer of 1912, R. H. Young, a real estate agent, purchased lot 1 and the west half of lot 2 in block 23, shown on a plan of survey of part of lot 89 of the Parish of St. Boniface, registered in the Winnipeg Land Titles Office as plan 386, which lots are situated on Marion Avenue, in the City

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of St. Boniface. Having ascertained that Dr. McKenty was the registered owner of the other half (*i.e.*, the east half) of this lot 2, Young commissioned A. J. Reese, another real estate agent, to inquire from the doctor what were his terms. Shortly afterwards, Young advised the manager of the plaintiff company, with which he was connected, to buy this half-lot from the doctor, so that, holding between them the whole two lots forming 100 feet, the property could be sold to better advantage. Reese, however, in the meantime had seen Dr. McKenty who informed him that he had sold to the defendant. In fact, the doctor had given the defendant an agreement for sale (Exhibit 5) wherein his half of lot 2 was erroneously described as if it were the west half instead of the east half. The doctor had, of course, intended to convey the east half which was the only part of lot 2 that he ever owned; and, as to the defendant, it appears from his examination for discovery (Questions 15, 74 and 77) that he did not know, and in fact did not care, which half of the lot he was purchasing, his mind being mainly directed in a general way to acquire such half of the lot as the doctor did own.

Being advised, then, by the doctor that he had sold to the defendant, Reese went to see the latter who stated his price and terms; and later, on August 1st, after having reported to the plaintiff company who were satisfied with the conditions, Reese paid for them \$25 to the defendant and took therefor a receipt (Exhibit 2), wherein the west half is set out. Reese says he told the defendant on that occasion that he did not think his half could be the west half. But the defendant then produced the agreement he held from the doctor and the receipt was accordingly made for the west half.

There were then the following communications:

1st. Letter (Exhibit 3) from the defendant to the plaintiff's solicitors, undated, probably of about August



20, transmitting for execution agreement for sale (Exhibit 9) from the defendant to ....., of the west half of said lot 2.

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2nd. Letter (Exhibit 4) from the plaintiff's solicitors to the defendant, returning agreement (Exhibit 9) unexecuted, together with agreement for sale (Exhibit 5) from McKenty to the defendant first hereinabove referred to, and asking that the two documents be corrected so that the description be of the east half instead of the west half, and also that the acceleration clause be deleted in Exhibit 3.

3rd. Letter (Exhibit 6) from the defendant to plaintiff's solicitors of September 2nd, enclosing cheque for \$25 as a return of the deposit, "owing to Dr. McKenty's continued absence and consequent delay in regard to the title and agreement in part of Lot 2, Block 3, Plan 386, St. Boniface" and "as being the most satisfactory way of settlement."

4th. Letter (Exhibit 7) from the plaintiffs' solicitors to the defendant, returning his cheque and asking him to make title, etc.

5th. Letter (Exhibit 10) from the defendant's solicitors to Reese, intimating that the bearer will return to him the \$25, which was in fact tendered and refused.

I should say that it appears that Dr. McKenty was away from the Province when this correspondence was going on in August and September. The defendant, however, made no effort to communicate with him at the time; but, on the doctor's return, he obtained a proper transfer from him, and the east half of the said lot 2 is now duly registered in the Winnipeg Land Titles Office in the defendant's name. Nor should I omit a fact, which I am sure appeared as important to the defendant at the time as it does to me in considering this case, which is that land values in the locality were rising in September last.

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Besides the main ground of defence under the Statute of Frauds, there were three others raised, which I may dispose of at once without lengthy consideration.

It was firstly urged that the parties contemplated a formal agreement being entered into. Probably they did in a general way, and I would assume that almost everyone except the very inexperienced does so in like conditions, considering especially the requirements of our system of registration. But this is very different from an understanding between the parties not to be bound by their writings in the usual way, of which I do not see that there is any evidence. Besides, the payment of \$25 is in itself strong evidence that the parties intended that the bargain should be definite and conclusive from the beginning.

The point was also taken that the plaintiffs' name appears nowhere in the documents and that the receipt is made to A. J. Reese; but it was open to the plaintiffs and quite sufficient to show, as they have done, that Reese was acting throughout as their agent: *Filby v. Hounsell*, [1896] 2 Ch. 737.

Then, it was contended that, after the plaintiffs' solicitors, by their letter of August 27th, had sent back to the defendant the blank agreement (Exhibit 9) with the request that the description be changed and the acceleration clause struck out, it was open to the latter to repudiate the contract as he did. As to the change in the description, it was made necessary by that which was mainly the defendant's error; and, as to the acceleration clause, there was nothing concerning it in the documents otherwise constituting the agreement (as I shall find), and it was moreover not the reason for the defendant's withdrawing, that reason being stated by him in Exhibits 6 and 7 as being, first, Dr. McKenty's absence and, later, inability to make title or deliver the land.

The question really to be dealt with is: Does the

initial receipt (Exhibit 2), considered either alone or together with the correspondence outlined above, constitute a sufficient memorandum under the Statute of Frauds?

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In my opinion, defendant's letter (Exhibit 3) to the plaintiffs' solicitors, "enclosing agreement as desired by Mr. Reese," and asking that it be "signed and returned with cheque for balance of first payment," is quite sufficiently connected with the receipt.

And so, in my opinion, is the agreement (Exhibit 9) connected with said defendant's letter (Exhibit 3) read, as it should be, together with the receipt. See *Owen v. Thomas*, hereinafter cited.

It is objected that the plan referred to in this agreement (Exhibit 9), is Plan 38. By comparing, however, the space which separates the figures "38" from the following comma, with the spaces in the same description which separate the figures "223" and "89" respectively from the following commas, I judge that this figure "38" was meant to be followed by another figure so as to express, not thirty-eight, but three hundred and eighty or three hundred and eighty and more. Why was the third figure, expressing the units, not inserted? The explanation seems simple, and would show that "38" was meant to be "386." The typewriting machine used was obviously defective in that the key of "6" did not work. So that the agreement must have been first typewritten, leaving blank spaces where there should have been a "6." There were no less than twelve such blanks left, wherein the figure "6" was subsequently inserted by hand. But the space following "38" was not so filled, clearly, in my opinion, through an oversight. It is not necessary, however, that I should find that the figures "38" were meant for "386;" it is sufficient that I should find that they were not meant to express thirty-eight.

But another letter of the defendant to the plaintiffs'

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solicitors (Exhibit 6), which I take to be sufficiently connected by description and other references with the receipt and the aforesaid letter and agreement, gives the plan as 386.

I also believe that letter (Exhibit 10), from defendant's solicitors to Reese, is sufficiently connected with the previous documents. In fact, it could hardly be more explicit, except that here again the plan is given as 38 instead of 386. The error in this case, as it seems, was a reproduction of the first, due to the fact, probably, that the solicitors copied the description from said agreement (Exhibit 9), including the number of the plan as it appeared there; and, as above pointed out, the defendant in his previous letter (Exhibit 6) had already given the plan as No. 386.

But I am of the opinion that the receipt by itself, describing the property as part of "lot 2, block 23, being 25 feet on Marion Street," is a sufficient memorandum under the Statute. The defendant moreover identified the property by saying in his examination for discovery (Question 70) that it was the land he had bought from Dr. McKenty on Marion Street, and by locating the Marion Street mentioned in the agreement as being in the City of St. Boniface. He also says that this was the only property that he had on Marion Street, and the defendant moreover had just the one transaction either with the doctor or the plaintiffs.

In *McMurray v. Spicer*, L.R. 5 Eq. 527, the description, "the mill property including cottages in Esher village," was held by Malins, V.C., not to be ambiguous, and he says in the course of his remarks: "The Courts have gone to great length in holding that a very general description of property is sufficient to perform a contract."

In *Owen v. Thomas*, 3 My. & K. 353, referred to in the case just cited, the vendor, having a house at Chepstow, did not enter into any contract but wrote to

his solicitors: "I have sold my house to Mr. Thomas for so much money. The deeds are in your hands." This was held sufficient and parol evidence was admitted to explain the subject of the contract on the ground that "the Statute of Frauds requires only a note or memorandum that a contract has been entered into."

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In our own Court, in *Heath v. Sanford*, 17 M.R. 103, where the description in the receipt was "the south 50 feet of two lots on the corner of Alfred and Main Street," it was held that the document was incomplete inasmuch as it was not stated whether the lots were in Portage la Prairie or elsewhere, but that this could be supplemented by oral evidence.

There will be an order for rectification and, upon the plaintiffs paying into court the proper amount within 30 days, an order for specific performance within 30 days from such payment.

Further directions reserved.

Costs to the plaintiff.

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## COURT OF APPEAL.

### ROBINSON V. McCAULEY.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and HAGGART, J.J.A.

*Registered judgment—Judgments Act, R.S.M. 1902, c. 91, s. 2(f) and s. 3—Conveyance absolute in form given as security for debt—Right of grantor to surplus upon sale—Liability of grantee to judgment creditor of grantor in respect of surplus after sale—Notice—Real Property Act, R.S.M. 1902, c. 148—Fraudulent preference—Intent to prefer—What constitutes insolvency—Creditor's knowledge of the intent to prefer—Assignments Act, R.S.M. 1902, c. 8, ss. 38, 39, 40, 41, 42—Transaction having effect of preference.*

The defendant McCauley, being indebted to John Gunn & Sons and being pressed for payment, and unable to pay the debt in cash, offered the land in question in settlement of the account. This was refused and McCauley then offered the land as security for the debt. This offer was accepted and the land was transferred to the defendant

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Gunn, one of the firm of John Gunn & Sons, by a transfer under the Real Property Act, absolute in form, under which he obtained a certificate of title in his own name in March, 1911. In July, 1912, Gunn sold and transferred the property to a purchaser procured by McCauley and afterwards accounted to McCauley for the full amount of the proceeds after deducting the claim of John Gunn & Sons.

The plaintiff's claim was on a judgment against McCauley for \$996.70, of which he had registered a certificate on 11th October, 1911, and he brought this action for a declaration that the transfer of the land to Gunn was fraudulent and void as against him and the other creditors of the defendant McCauley and for an order that Gunn should account for all moneys received from the sale of the land and pay the same over to the creditors under the direction of the Court, or, in the alternative, that Gunn should account to the creditors for the amount he had paid over to McCauley out of the proceeds of the sale.

At the time of the sale by Gunn and until after he had paid over such proceeds to McCauley, he had no knowledge of the plaintiff's judgment or of McCauley's insolvency, if he was in fact insolvent at that time. There were three unpaid judgments against him aggregating \$2032.48, including those of the plaintiff and John Gunn & Sons, and he had a short time previously made a number of transfers of land to various creditors in satisfaction of their claims, but the utmost that could be inferred from the evidence, in the opinion of the trial judge, was that he was short of money and had used some of his lands as the medium of payment of his debts instead of cash.

*Held*, by the Court of Appeal, that the registration of a certificate of judgment under the Judgments Act, R.S.M. 1902, c. 91, against the "lands" of a judgment debtor who has previously conveyed land to another creditor by a transfer under the Real Property Act absolute in form but only as security for his debt, does not constitute notice of such judgment creditor's lien, if any, on the equitable interest of the judgment debtor in the land, and the transferee, on subsequently selling the land and realizing a surplus, is not bound to search in the Land Titles office for judgments registered against the transferor, but may safely pay such surplus over to him, unless he has had actual notice of the registration of the judgment.

*Pierce v. Canada Permanent*, (1895) 25 O.R. 671, 23 A.R. 516, followed. *Held*, also by CURRAN, J., in the Court below.

1. The evidence fell short of showing that, when McCauley transferred the land to Gunn, he was in insolvent circumstances within the meaning of that expression as defined in *Davidson v. Douglas*, (1868) 15 Gr. at p. 351.
2. As this action had not been commenced within 60 days after the impeached transaction and there had been no assignment under the Assignments Act, R.S.M. 1902, c. 8, neither section 40 nor section 41 of that Act could be invoked by the plaintiff.

3. Section 42 of the Act applies only to cases arising under sections 40 and 41, and, therefore, its provisions could not be considered in this case.
4. The plaintiff could not succeed under section 38 of the Act as he had failed to prove that the transfer in question had been made "with intent to defeat, hinder, delay or prejudice" the creditors of McCauley or any of them, or that Gunn had participated in such intent.
5. The plaintiff could not succeed under section 39 as he had failed to prove either the insolvency of McCauley at the time, or his intent to prefer, or participation by Gunn in such intent.
6. Although the impeached transaction had the effect of preferring Gunn & Sons to the other creditors, that fact alone was not sufficient to avoid it under either section 38 or section 39, where the words "which have such effect" do not appear.
7. To constitute a fraudulent preference to a creditor under section 39 of the Act, there must be a concurrence of intent on the part of both debtor and creditor: *Parker on Fraud*, pp. 163, 170, and *Hepburn v. Park*, (1884) 6 O.R. 472.
- Schwartz v. Winkler*, (1901) 13 M.R. 493; *Stephens v. McArthur*, (1890) 6 M.R. 497, and *Codville v. Fraser*, (1902) 14 M.R. 12, distinguished, on the ground of subsequent changes in the statutes in force when they were decided.
8. Even if a presumption of knowledge by the creditor of the debtor's insolvency arises against the creditor for any reason, it is open to him to rebut it by evidence as had been done in this case.

ARGUED: 24th November, 1913.

DECIDED: 8th December, 1913.

THE plaintiff was a registered judgment creditor of the defendant McCauley, and sought to set aside a transfer of the north east quarter of section 2 in township 6 and range 8 east of the Principal Meridian in the Province of Manitoba, excepting thereout the land taken for right of way of the Manitoba & South Western Railway, from that defendant to his co-defendant, alleging that it was void as a preference under The Assignments Act, or as made with intent to defeat creditors.

The following judgment at the trial was delivered by

CURRAN, J. Plaintiff's judgment is for \$996.70, and a certificate thereof was duly registered in the Winnipeg Land Titles Office being the proper registry office in that behalf, on October 11, 1911. The transfer in question

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was made on February 28, 1911, for an expressed consideration of \$1.00 and was registered in the same Land Titles Office on March 11, 1911, and a certificate of title under the Real Property Act was issued to the defendant Gunn, subject to a mortgage for some \$300.

The defendant Gunn is a member of the firm of John Gunn & Sons, also creditors of the defendant McCauley, who obtained a judgment against him for \$877.53, and duly registered a certificate thereof in the Winnipeg Land Titles Office on 23rd August, 1911.

I find, upon the evidence, that the defendant Gunn was pressing the defendant McCauley for payment of his firm's debt at the time the transfer of the land was given; that the defendant McCauley was unable to pay and offered the land in settlement of the account, which was refused; that McCauley then offered the land as security for the debt, which offer the defendant Gunn, on behalf of his firm, accepted and agreed to account to the defendant McCauley for any surplus arising from a sale of the land after paying the mortgage upon it, and John Gunn & Sons' claim. The defendant Gunn swears that his co-defendant told him at the time the transfer was made that he had about \$35,000 worth of real estate, but was not able to realize. There is no evidence to substantiate the truth of this information. That he McCauley said nothing about his obligations and was asked no questions about them.

There is no doubt that the transaction, though absolute in form, was in reality intended to be a security only for McCauley's indebtedness to John Gunn & Sons, and that the defendant Gunn was in fact a trustee with power to sell, pay off the mortgage and John Gunn & Sons' claim and account to the defendant McCauley for the surplus, if any. It apparently was understood that the defendant McCauley should also have the right to sell the land, for on or about July 11, 1912, a sale was made by an agent



in whose hands McCauley had placed the farm for sale. The defendant Gunn's consent to this sale was obtained, and he, Gunn, entered into an agreement of sale, Exhibit 2, with the purchasers, John and Thomas Jackson, dated July 11, 1912. The purchase price was \$4,500, of which \$1,500 was paid in cash and the balance of \$3,000 to be paid in two equal payments on the 11th July in the years 1913 and 1914, with interest at 6%. Gunn, as vendor, executed the agreement, received the proceeds of the cash payment, and subsequently sold the agreement to the Sterling Loan & Agreement Co. for \$2,730. The actual amount he received of the cash payment was \$995.57. The mortgage on the land and some other matters were paid out of the cash payment and the above represents the balance.

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The amount of the cash payment was more than sufficient to pay the mortgage and John Gunn & Sons' claim, so that the defendant Gunn had really no further interest in the sale or in the deferred payments. It appears that McCauley, shortly after the sale, offered to sell the agreement to Gunn for \$2,500 cash. Gunn found a purchaser in the Sterling Loan & Agreement Company, at \$2,730, an advance of \$230, and Exhibit 2 was duly assigned to that Company by means of Exhibit 3. The defendant received the purchase money, \$2,730, and out of it paid the defendant McCauley \$1,900 by cheques, Exhibit 5, retained, with McCauley's full knowledge and consent, his profit or commission of \$230 and the balance, \$657, is still in his hands to protect a claim for commission made by the agent, A. E. H. Lloyd, who effected the sale of the land in the first instance and which claim is disputed. The defendant Gunn by his statement of defence admits holding this money and alleges a willingness to pay it as directed by the Court.

The plaintiff claims that the transfer of the land from the defendant McCauley to the defendant Gunn was

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fraudulent and void as against the plaintiff and other creditors of defendant McCauley, and asks for an order requiring defendant Gunn to account for all moneys received from the sale of the land and pay the same, or a like amount, over to the plaintiff and other creditors of defendant McCauley under the direction of the Court, or an alternative order that defendant Gunn pay to the plaintiff and all persons who had judgments against McCauley at the time of sale in order of priority of registration, to the extent of \$1,900. When the sale was made there was one other judgment against the defendant McCauley besides the judgments of the plaintiff and John Gunn & Sons, making in all, at the time, judgments to the amount of \$2,032.48, owing and unpaid. Subsequently in January, 1913, two other judgments, aggregating \$599.55, were obtained against McCauley and certificates registered; but I do not think that they ought to be taken into consideration, and are not relevant to the situation. There is no evidence of any other liabilities at the time owing by McCauley, but he admits on his examination for discovery that about three months prior he had made a number of transfers of land to various creditors. No particulars of these transactions are given, and the utmost one could infer from them is that the defendant was short of money and used some of his lands as the medium of payment instead of cash.

Now, has the plaintiff any status to impeach this transaction? Suppose the defendant McCauley had not transferred the land to the defendant Gunn, but kept it himself and made the sale to Jacksons and received the purchase money and out of it paid John Gunn & Sons' claim, could such a sale be impeached or the money followed. I think clearly not. What difference, then, does it make that the title was temporarily vested in Gunn for a special and lawful purpose? Defendant McCauley is still the party who makes the sale and

receives the purchase money, not directly, but through the hands of Gunn. It seems to me no distinction can be made between the two cases.

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But the plaintiff says the land, or McCauley's interest in it, was bound by his judgment when sold to Jackson. He says sub-section (f) of section 2 of the Judgments Act is wide enough to cover such an interest in land as he contends McCauley still had in the lands in question, notwithstanding the transfer to Gunn. Perhaps it is, and it may well be that, so long as the land remained in Gunn's hands unsold and unencumbered, the plaintiff's lien, created by the registration of his judgment, could have been enforced by this Court against McCauley's equitable interest. Possibly also actual notice of the plaintiff's registered judgment to the defendant Gunn would have bound such interest to the extent, at all events, of preventing, in case of a sale, the payment over of the purchase money to McCauley in disregard of the plaintiff's rights; and, if, notwithstanding such actual notice, Gunn took the responsibility of disregarding it, he could not complain if ordered to pay the money over again.

But could this right be asserted after the land had been sold and the purchase money innocently paid over without any notice or knowledge to the defendant Gunn of the plaintiff's judgment? I think clearly not. It would be contrary to every principle of natural justice and equity under such circumstances to hold Gunn responsible for the money he had *bona fide* paid to McCauley. The registration of the certificate of plaintiff's judgment was not notice to him. The Registry Act affects those acquiring land and not those parting with it: *Pierce v. Canada Permanent Loan Co.*, 25 O.R. at pages 675 and 676. *Prima facie* the registration of the certificate of the plaintiff's judgment did not bind this land, owing to the position of the registered title. It had been completely and legally alienated by the

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debtor. The defendant Gunn had acquired under the Real Property Act an absolutely good title to it. His certificate of title could not be impeached, except perhaps collaterally. Certainly not by McCauley. No search in the Registry office or Land Titles Office by anyone proposing to deal with the land could have affected such person with notice of the plaintiff's judgment or that McCauley had any interest in the land. If, then, the plaintiff claimed a lien on land of which the defendant Gunn was the registered owner, he should have filed a caveat or given actual notice to Gunn or taken proceedings to enforce his claim whilst the property was still in Gunn's possession, ownership or control. He failed to do any of these things, and it is now, I think, apart from the effect of the Assignments Act on the transaction, entirely too late to seek recourse against Gunn, an innocent party who has neither the land nor the money.

The plaintiff contends that the defendant Gunn cannot, in any case, retain the \$230 of profit made on the sale by him of the agreement of sale to the Sterling Loan & Agreement Co. I fail to see why. It was legitimately earned and retained with the entire approbation of McCauley. The agreement and the moneys represented by it in fact then belonged to McCauley, who had a right to dispose of it as he saw fit. Another agent might have been employed to find a buyer. If so, could his right to commission be questioned by the plaintiff? I do not think so. And I cannot see that the defendant Gunn is in any worse position in this respect.

I would have delivered judgment dismissing the plaintiff's action at the conclusion of the trial, but for the contention that the transaction was void under The Assignments Act, a matter which required consideration.

The plaintiff relies upon sections 38 and 39 and 40 of this Act for redress. Section 40 could not be invoked because the action was not begun within 60 days. Section 41

does not apply because no assignment for creditors was in fact made, and I take it that section 42 applies only to cases arising under sections 40 and 41. I think the language of that section 42 can bear no other construction. It says: "A transaction shall be deemed to be one which has the effect of giving a creditor a preference over other creditors within the meaning of the last two preceding sections," etc. And, if the transaction is preferential as defined in this section, the questions of intent, motive, pressure, want of knowledge of the debtor's circumstances or the effect of the transaction are all eliminated and shall not avail to protect the transaction. That is, such transactions as are referred to in sections 40 and 41 and not such as may be impeached under sections 38 and 39. The legal presumptions in sections 40 and 41 are, I think, restricted to cases which fall within those sections. It will also be noticed that these sections are limited to transactions "which have the effect" of giving one creditor a preference over the other creditors, and if the proceedings are taken within the prescribed time, sixty days, the transactions impeached are declared to be utterly void, in the one case against the creditor or creditors injured, etc., and in the other against the assignee or any creditor authorized to take proceedings under the 48th section.

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Section 42 defines what shall be deemed a preferential transaction, and any transaction falling within its scope, if attacked within the statutory time, must be set aside under sections 40 or 41 as the case may be unless protected under sections 47 and 48. I do not think that section 42 applies to actions arising under sections 38 and 39, because they are upon a different footing.

Section 38 deals with gifts, conveyances, etc., by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full, or knows that he is on the eve of insolvency with intent to defeat, hinder, delay

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or prejudice his creditors or any one or more of them, and declares all such utterly void as against the creditor or creditors injured, etc.

Section 39 deals with gifts, conveyances, etc., made, under the same circumstances as to insolvency referred to in section 38, to a creditor, with intent to give such creditor a preference over his other creditors or over any one or more of them, and declares all such utterly void as against the creditor or creditors injured, etc.

Now, do either of these sections 38 or 39 apply to the transaction in question? I do not think section 38 can apply as the transaction proved could only be one to prefer and not one to defeat creditors; but in either case the plaintiff must prove: first, insolvency of the debtor, secondly, intent to prefer or defeat, and thirdly, I think, participation by the creditor to whom the conveyance is made in the intent to prefer or defeat.

Now, was the debtor McCauley in insolvent circumstances within the meaning of section 39 when he made the transfer to his co-defendant? McCauley admits upon his examination for discovery that he had not ready money to enable him to pay his debts in full when he made this transfer. At page 4 of such examination he admits having made a number of transfers to various creditors about three months prior, which would indicate that he was financially embarrassed, or in want of ready money. He was admittedly unable to pay the plaintiff's claim, had been sued for it, and the action was pending when the transfer complained of was made. He furthermore was unable to pay the claim of John Gunn & Sons. He was nevertheless possessed of the farm in question, which, if in fact all the landed property he then owned, was worth, and actually realized more than, enough to satisfy in full all the debts which the evidence disclosed he then owed. At pages 15 and 16 of his examination will be found these questions and answers:

"Q. At the time you made the transfer to Gunn you were not able to pay all your debts were you?  
A. No, sir.

"Q. You were in financial difficulties were you not, you were in difficulties; you were being pressed by various creditors? A. Yes.

"Q. And you didn't have any money to pay them?  
A. No."

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Although clearly he had not the money in hand to discharge his liabilities owing at this time, I could not hold that he had not the adequate means in other species of property at his disposal to do so.

The case of *Empire Sash & Door Factory v. Maranda*, 21 M.R. 605, is the latest case I can find in which the identical point under section 40 was considered and decided. In the light of the authorities, most of them conflicting, referred to in this case, I find it difficult to reach a conclusion. General principles are sometimes difficult of application; but upon the whole I incline to the definition of Spragge, V.C., in *Davidson v. Douglas*, 15 Gr. at p. 351, where that learned Judge says:

"In considering the question of the solvency or insolvency of a debtor, I do not think that we can properly look upon his position from a more favorable point of view than this, to see and examine whether all his property, real and personal, be sufficient, if presently realized, for the payment of his debts; and in this view we must examine his land as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or at a sale when the seller cannot await his opportunities, but must sell."

Applying the test here laid down the debtor McCauley would not seem to have been in insolvent circumstances, and, upon the best consideration I am able to give the law and the evidence, I so hold.

I find also that the land was transferred to the defendant Gunn as security only for the payment of the

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claim of John Gunn & Sons and upon the further condition that, upon a sale for more than the amount of this claim and the existing mortgage on the land being effected, the defendant Gunn was to account to McCauley for the surplus; that the land was so transferred with the intent merely to secure John Gunn & Sons' debt, without contemplation of the claims of other creditors.

It is true the transaction had the effect of preferring this firm to any other creditors there may have been, but neither section 38 nor 39 applies to transactions which merely have the effect of preferring or defeating; but deal with cases only of intent to prefer or defeat and I cannot hold that the debtor McCauley actually had an intention of preferring John Gunn & Sons to his other creditors. I find that the defendant Gunn had no knowledge of his co-defendant's financial circumstances when the transfer was made, and that he was not knowingly a party to securing an unjust preference.

I find that the defendant Gunn took the land merely to secure the debt justly due his firm, because he was unable to obtain payment in money, and that he did so without inquiry as to the defendant McCauley's financial position. In short, that Gunn acted honestly in taking this land as security believing that he had a legal right to do so.

In this connection, it is necessary to consider the question of knowledge on the part of the preferred creditor. In *Schwartz v. Winkler*, 13 M.R. 483, it was held that it was not necessary to show notice to the transferee of the debtor's insolvent condition; but in any case, if the transferee had such a knowledge of the debtor's financial position that an ordinary business man would conclude from it that the debtor was unable to meet his liabilities, constructive notice of the insolvency should be imputed to him. I cannot hold that Gunn



had such a knowledge that constructive notice of the insolvency should be imputed to him, even if the debtor was in fact insolvent. But, if notice is not necessary to invalidate the transaction, it is not profitable to further consider this question.

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I think, however, this case can and ought to be distinguished. It was decided upon different statutory provisions from those which apply here. The case was decided in 1901 upon the then section 33 of The Assignments Act, R.S.M., 1892, c. 7, and an amendment, both of which I will set out in full for further lucidity. Section 33 provided that a transfer of property made by any person at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency, with intent to defeat, delay, or prejudice his creditors or to give one or more of them a preference over his other creditors, or over one or more of them, or which has such effect, shall, as against them be utterly void.

This section was amended in 1900 by adding this clause:

"If such transaction with or for a creditor has the effect of giving that creditor a preference over other creditors of the debtor or over one or more of them, it shall, in and with respect to any action or proceeding which within sixty days thereafter is brought, had or taken to impeach or set aside such transaction, or if the debtor within the same period after the transaction makes an assignment for the benefit of his creditors, be presumed *prima facie* to have been made with the intent aforesaid and to be a preference within the meaning of this section, and no pressure on the part of the creditor will be sufficient to support the transaction or refute the presumption of preference."

Now, section 33 seems to embody what is now found in sections 38 and 39, with this difference that it has the words, "or which has such effect", which are not found in either section 38 or 39. The amendment seems to embody

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some of the provisions of sections 40, 41 and 42, but not all. It contains the 60-days limitation for impeachment and does away with the doctrine of pressure, but says nothing of notice or knowledge to the creditor of the debtor's financial circumstances. The Court there held that this need not be proved and yet, when the Legislature recast the statute and enacted section 42, in addition to retaining the proviso as to pressure, it took pains to expressly say that want of notice to the creditor alleged to have been so preferred of the debtor's circumstances, inability or knowledge as aforesaid or of the effect of the transaction shall not avail to protect the transaction. Why was this necessary in view of the decision in the *Schwartz* case? I think it was done for this reason: that in recasting the former statutory enactments the Legislature for effective purposes divided impeachable transactions into two groups or classes, those done with intent to defeat or prefer and those which have the effect of preferring, whereas formerly the words, "or which has such effect", were to be found in all of the former statutes, and where a transaction was found to have the effect of preferring it was in consequence utterly void and the question of notice or knowledge in the preferred creditor was wholly immaterial. Now, however, it is only transactions which have the effect of preferring, within sections 40 and 41, and which are attacked within the sixty-days limit, that are declared to be utterly void without regard to motive, intent, knowledge or pressure as set forth in section 42, and that, in transactions sought to be impeached under sections 38 and 39 beyond the sixty-days limit, it is still necessary to prove intent to defeat or intent to prefer, and under such circumstances I think the question of notice or knowledge is material, and that it must be brought home to both the parties to the transaction.

I think that, if action is not taken within the sixty-days

limit, sections 40, 41 and 42 cannot be relied on and that relief must then be sought under sections 38 and 39. All of the decided cases, where notice or knowledge was held not to be necessary, were so decided under the former enactments which, as I have pointed out, all contained the words, "or has such effect."

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For example, *Stephens v. McArthur*, 6 M.R. 497, decided on the 47 Vic., c. 45, s. 2; *Schwartz v. Winkler*, 15 M.R. 493, decided upon the then section 33, R.S.M., 1892, c. 7, and the amendment 63 & 64 Vic., c. 3, s. 1, statutes of 1900; *Codville v. Fraser*, 14 M.R. 12, decided on the same statutes as *Schwartz v. Winkler*.

In the latter case the question of intent seems to have been the main issue. The action was brought within the sixty days and it was held that what the Court must search for under our statute is what was the dominant or governing motive of the debtor? At p. 25 of the report of this case, I find this expression:

"Nor does it appear to me important to determine whether the defendant's agent was acting *bona fide*  
\* \* \* it being only the debtor's mental attitude that we are considering."

Not a word appears in this judgment as to the preferred creditor's mental attitude, or whether or not the question of notice or knowledge on his part of the debtor's intent or financial position is an essential factor to be considered.

*Parker on Fraud*, at p. 170, lays it down that, under the old Ontario Act of 1885, which had not the words, "or which has such effect", it had been held that a concurrence of intent must be shown on the part of the debtor and creditor to invalidate the transaction and that the Legislature apparently conceived the idea of making the effect of the transaction the test of its validity, and hence the insertion of the words quoted.

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And again at p. 163:

"The weight of authority preponderates to the view that, in order to work a fraudulent preference to the creditor, there must be a concurrence of intent on the part of both debtor and creditor; that is, intent by the debtor to give and the creditor to get a preference. This has been said to be on the principle that, if the person taking the security be innocent of any fraudulent intent, he cannot be affected by this fact, if it be a fact, that there was a fraudulent intent unknown to him in the mind of the debtor: *Hepburn v. Parke*, 6 O.R. 472."

See also as to rebuttal of *prima facie* presumption of intent: *Dana v. McLean*, 2 O.L.R. 466.

In any case, if it is not necessary for the plaintiff to prove that the creditor had knowledge of the debtor's insolvency at the time of the transfer, I think it open to the creditor, if such a presumption arise against him to rebut it; and here I think the defendant Gunn has satisfactorily rebutted any knowledge whatever of his co-defendant's financial position, from which either actual or constructive notice of insolvency can be imputed to him.

The case of *Re Johnson, Golden v. Gillam*, 20 Ch. D., 389, decided, however, on the 13 Eliz., c. 5, is instructive as to the question of intent.

I find, then, upon the evidence, though not without some doubt, that the defendant McCauley was not in insolvent circumstances when he conveyed the land to the defendant Gunn; that the dominant motive was not to prefer John Gunn & Sons to his other creditors, but merely to provide a means of securing payment to that firm; that the defendant Gunn was ignorant of the fact, if it be a fact, of his co-defendant's insolvency, and took the conveyance in good faith and without any intention of prejudicing other creditors of whose existence I hold, upon the evidence, he had no knowledge whatever.

It is true the effect of the transaction was to diminish

or perhaps altogether do away with the prospects of the plaintiff and other creditors to realize their claims against the debtor; but, in the view I take of the various sections of the Act, I think this is immaterial here and that action on this account should have been taken within sixty days.

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Upon the best consideration I have been able to give the case, and in view of the many conflicting decisions on this statute, I must hold that the transaction cannot be set aside.

I should be glad to see this question of concurrent intent settled by a higher authority, as the law seems to be not very well or clearly understood as to just what a plaintiff must prove to succeed under sections 38 or 39.

With regard to the alternative claim to the \$1,900 surplus realized from the sale of the land, I hold that the plaintiff cannot succeed, as he has failed to affect the defendant Gunn with notice of his judgment until too late to prevent his paying the money over to his co-defendant as he was bound to do in pursuance of his trust.

I find that this payment over was made *bona fide* and without any notice or knowledge of the plaintiff's judgment or that the defendant McCauley's equity in the land was or could be bound by the plaintiff's judgment.

The plaintiff's action will be dismissed with costs.

The defendant McCauley will only be entitled to costs of filing his statement of defence and a counsel fee at trial such as would be allowed with a watching brief only.

Plaintiff appealed.

A. E. Hoskin, K.C., and W. S. Morrissey for plaintiff, appellant, cited *Wallace v. Smart*, 22 M.R. 68; *Reddick v. Traders' Bank*, 22 O.R. 449; *Cook v. Basley*, 123 Mass. 396; *Wiggin v. Heywood*, 118 Mass. 514; *Buttrick*

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Argument. *v. Wentworth*, 88 Mass. 79; *Charles v. Jones*, 35 Ch. D. 544; *Re Gregson*, 36 Ch. D. 223; *West London v. Reliance*, 29 Ch. D. 954; *Re Kingsland*, 8 P.R. 77; *Gilleland v. Wadsworth*, 1 A.R. 82; *Moore v. Hobson*, 14 Gr. 703; *Anderson v. Elgey*, 26 Ch. D. 567; *Magnus v. Queensland*, 36 Ch. D. 25; *McLennan v. McLean*, 27 Gr. 54, and *Pierce v. Canada Permanent*, 25 O.R., 675.

*C. P. Wilson, K.C.*, and *E. P. Garland* for defendant Gunn, respondent, cited *Harper v. Culbert*, 5 O.R. 162, and *Trust & Loan Co. v. Shaw*, 16 Gr. 446.

The judgment of the Court was delivered by

HOWELL, C.J.M. The conveyance to Gunn was absolute in form, and he properly procured a certificate of title in his own name with all the rights and powers which such title gives.

The learned trial Judge finds that the land was vested in Gunn as security for the indebtedness due him and he further finds that Gunn had power to sell the land, apparently even without the consent of McCauley, and apply the proceeds, 1st, in payment of a mortgage then upon the property; 2nd, in payment of his own claim, and 3rd, to pay the balance to McCauley.

There is ample evidence to support this finding. Gunn, in his uncontradicted testimony, says:

"And he offered me the land for the account, or I could take it as security \* \* I told him, if the land was sold and the proceeds were more than the amount of the account, that he could have the difference."

The evidence shows that upon this understanding the property was absolutely vested in Gunn. The position of Gunn was that the absolute title to the property was vested in him with power of sale without the concurrence of the grantor and the only right which the latter would have would be to ask for an account of the purchase

money. Before sale perhaps McCauley might have a right of redemption, that is, a right to prevent the sale, but after the sale that right was gone.

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Both parties agreed, as they lawfully might, that, without regard to the Real Property Act, Gunn should hold, sell and convey the land as owner and account only for money. If the land was mortgaged to Gunn under the Act, he would have no title to the land and could only cut out McCauley by proceeding in the manner by that Act provided. They chose not to take that course. The parties agreed to a different course and McCauley agreed to divest himself of all title and make Gunn his trustee, as he lawfully might. Gunn sold the land and conveyed it away as agreed upon, and he further accounted to McCauley for the purchase money, as he had agreed to do, without any notice or knowledge of the plaintiff's claim, unless the registration of the judgment alone is notice and is a charge on this money.

The effect of a registered judgment is provided for by section 3 of chapter 91, R.S.M. 1902, which states that

"The said judgment shall \* \* bind and form a lien and charge on all the lands of the judgment debtor."

Section 2, s-s. (f), defines "lands" to be "every estate, right, title and interest in land or real property, both legal and equitable."

In no place in the Judgments Act is there any statement that the registration of a judgment shall be notice, nor is there any provision to that effect in the Real Property Act; but apparently it might be charged upon the title of a debtor under section 81 of that Act. The principle of that Act is the registration of the title and not of instruments, and I would expect to find on the title only the certificates of judgments against the registered owner; but, without deciding anything on this subject, I cannot see that this last mentioned section charges Gunn with notice of the judgment.

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Suppose the debtor had granted to the plaintiff a transfer of his claimed equitable right and also an assignment of the moneys in case of sale, still, if Gunn had no notice, he could quite safely pay over the money to the debtor. The difference between statutable notice and actual notice is thus expressed by Lord Redesdale in *Underwood v. Courttown*, 2 S. & L. 41:

"Actual notice might bind the conscience of the parties; the operation of the Registry Act may bind their title, but not their conscience."

Certainly in this case Gunn's conscience is not bound.

Under the old Registry Act the question as to the effect of subsequently registered instruments binding parties acting under prior registered instruments has frequently been discussed. In the case of *Pierce v. Canada Permanent*, 25 O.R. 671, affirmed in appeal, 23 A.R. 516, it was held that, where a mortgagee under a duly registered mortgage advanced money on his mortgage after the registration of a subsequent mortgage, without actual notice thereof, the prior mortgagee was protected.

In the case of *Hutson v. Valliers*, 19 A.R. at 161, Mr. Justice Maclellan, in a dissenting judgment, held that the registration of a mechanic's lien affected a prior registered mortgagee with notice, and Mr. Justice Ferguson followed him in the first judgment in *Pierce v. Canada Permanent*, 24 O.R. 426; but was reversed by the Divisional Court and the Court of Appeal, as above referred to.

The position taken by the Ontario Court, it seems to me, is amply supported by English cases referred to and fully discussed in that case, and, if this was a case under the old Registry Act, I should have no difficulty in holding that Gunn was fully protected in acting under his prior registered instrument without actual notice.

If, as was argued, the debtor had an equitable estate in this land, the Act gives the plaintiff ample means to



protect himself against the transfer by Gunn; the plaintiff could have registered a caveat against the title.

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The defendants fully complied with all the requirements of the Real Property Act and placed the title in such a way that Gunn could, and should, convey without reference to the register, and I know of no duty or statute requiring him to search.

I think that in this case, where the grantee had the absolute title and power to sell and convey, and was only required to account for the purchase money, the registered judgment, at all events after the sale, did not bind or make a charge on the purchase money in Gunn's hands, he having paid or otherwise disposed of it without notice.

Whether the statute did away with legal and equitable estate and created in their place a "registered estate," and whether a person who, under the old law, was the owner of an equitable estate which he could convey like real estate, has now only a right to bring an action and charge the "conscience" of the registered holder, need not in this case be decided. See *Crowley v. Bergtheil*, [1899], A.C. 390.

The question also whether this right of action is tangible enough to be bound by a registered certificate of judgment can also be passed over.

The subject is discussed in several Australian cases and in *Hogg on Australian Torrens System*, at 796, 881, 972. The author states that these equitable rights which exist only by the right to charge the conscience of the holder of the title are mere personal rights, and do not create equitable estates as usually understood in English Courts.

Without, however, in any way deciding these last mentioned questions, I would dismiss this appeal with costs.

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## COURT OF APPEAL

## MINER V. HINCH.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, JJ.A.

*Contract—Construction of contract—Vendor and purchaser—Agreement to pay interest—Rectification of Agreement—Laches.*

The defendant, in October, 1908, owning a house subject to a mortgage for \$4,000 bearing interest at  $7\frac{1}{2}$  per cent. per annum. upon the principal of which \$200 per year might be paid off, signed an agreement of sale of same to the plaintiff for the sum of \$9,500 payable as follows: \$5,500 part of said principal sum payable as follows:—\$500 in cash, \$500 on 1st November, 1908, and further instalments at half yearly and yearly intervals, the last of them on 1st November, 1912, "together with interest at the rate of seven per cent. per annum on all payments as from time to time remaining unpaid until payment, with interest payable on the 1st November, commencing November 1st, 1909. And the balance of \$4,000 by the assumption, on the completion of the said payments, of a mortgage of \$4,000 bearing interest at the rate of seven per cent. per annum. The payment of \$200 yearly by the vendor on said mortgage shall be taken into consideration by the purchaser at the time of assuming mortgage".

Following this there was a printed covenant by the purchaser that he would "well and truly pay or cause to be paid to the said vendor the said sum of money, together with the interest thereon at the rate aforesaid on the days and times and in manner above mentioned."

There was also a specially inserted provision at the end of the agreement in these words.

"Provided further that the purchaser shall have the privilege of paying off the whole or any part of the vendor's equity remaining unpaid at any time, without notice or bonus, by paying interest up to date of such payment."

*Held*, reversing the decision of the trial Judge, that, upon the proper construction of the instrument, the purchaser was not required to pay the interest accruing on the mortgage for \$4,000 prior to the time of payment of the last instalment of the \$5,500 and was entitled, on payment of that sum in full and all interest thereon, to a conveyance of the property subject only to the principal of the mortgage for \$4,000 and interest accruing thereon after such payment.

When the plaintiff made the payment due 1st November, 1909, she claimed that she had to pay interest only on the unpaid portion of the \$5,500 and made her payment accordingly, and so for all the subsequent instalments down to the 1st November, 1912, whilst the defendant, on receiving each payment, claimed that, from the beginning, the plaintiff had also to pay interest at 7 per cent on the

\$4,000 mortgage, and that he received the several payments only on account.

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The defendant had never made any attempt to have the agreement rectified, nor did he in his statement of defence, ask for such rectification, although he asked for it at the trial.

*Held*, that no clear case for rectification had been made out, and such should not be ordered after so great a lapse of time after the defendant became aware of the position taken by the plaintiff.

ARGUED: 6th November, 1913.

DECIDED: 8th December, 1913.

THIS action was brought to enforce the specific performance of an agreement for the sale of land in Winnipeg. Statement.

The plaintiff paid a certain amount in cash and was to assume a mortgage which had been placed upon the property.

The whole dispute was, whether the plaintiff, the purchaser, was, or was not, liable to pay interest upon the mortgage from the date of the agreement.

At the trial Macdonald, J., gave judgment for the defendant.

Plaintiff appealed.

*E. K. Williams* for plaintiff, appellant, cited *MacArthur v. Leckie*, 9 M.R. 113; *Sword v. Tedder*, 13 M.R. 572; *Leggott v. Barrett*, 15 Ch. D. 306, 309; *Savile v. Drax*, [1903] 1 Ch. 781; *Lippard v. Ricketts*, L.R. 14 Eq. 291; *Western Ass. Co. v. Ontario Coal Co.*, 19 O.R. 462; *Grahame v. Brown*, 12 U.C.C.P. 418; *Thompson v. Drew*, 20 Beav. 49, and *Ex Parte Hodge*, 26 L. J. Bank. 77.

*E. F. Haffner* for defendant, respondent, cited *Fludyer v. Cocker*, 12 Ves. 25, 27; *Words & Phrases*, vol. 6, p. 5247, and *Fry on Specific Performance*, 5th ed. 677.

RICHARDS, J.A. This action is for specific performance of an agreement, made by the defendant to sell to the plaintiff certain lands in Winnipeg. At the time of entering into the agreement the property was subject to

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a mortgage for \$4,000 bearing interest at seven and one-half per cent. per annum, upon the principal of which \$200 per year might be paid off.

A preliminary agreement in the handwriting of the plaintiff's husband, G. H. Miner, but signed by the defendant, was admitted in evidence. It is as follows:

"Winnipeg, Oct. 17th, 1908.

"G. H. Miner, Esq.,  
"City.

"Dear Sir: I hereby agree to sell to you House & Lot No. 574 Gertrude Ave. for the price and consideration of \$9,500.00 on the following terms, five hundred dollars cash, receipt of which is hereby acknowledged. A further payment of

\$ 500.00 on the 1st day November, 1908.

500.00 on the 1st day May, 1909.

1,000.00 on the 1st day November, 1909.

1,000.00 on the 1st day November, 1910.

1,000.00 on the 1st day November, 1911.

1,000.00 on the 1st day November, 1912.

with interest at 7% on all deferred payments. You are to assume on completion of payments covering my equity a nett mortgage of \$4,000.00 in addition to the above payment which makes the total purchase price \$9,500.00.

"Yours truly,

"H. H. Hinch."

After that informal document was signed, a formal one was prepared by the defendant and submitted to the plaintiff's husband. It was objected to and was not executed. It was not put in evidence. Apparently it had been lost or destroyed.

The formal agreement which is sued on was then prepared by a solicitor by direction of the plaintiff's husband, and was submitted to the defendant.

The defendant is a dealer in real estate and accustomed to draw agreements of sale. Apparently he thought the one so last prepared was correct as it was executed later on by both parties, though bearing the same date as that in the informal agreement.

After the formal parts, it reads as follows: (I omit the description of the land and a number of the clauses as immaterial to the present purpose).

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"Whereas the said vendor has agreed to sell the purchaser, and the purchaser has agreed to purchase of and from the said vendor \* \* \* at and for the price or sum of nine thousand five hundred (\$9,500) dollars of lawful money of Canada payable as follows:

The sum of five thousand five hundred dollars (5,500.00) part of said principal sum, payable as follows: Five hundred dollars (\$500.00) upon the execution of this agreement (the receipt whereof is hereby acknowledged); Five hundred dollars (\$500.00) on the first day of November, A.D. 1908; Five hundred dollars (\$500.00) on the first day of May, A.D. 1909; One thousand dollars (\$1,000.00) on the first day of November, A.D. 1909; One thousand dollars (\$1,000.00) on the first day of November, A.D. 1910; One thousand dollars (\$1,000.00) on the first day of November, A.D. 1911; and One thousand dollars (\$1,000.00) on the first day of November, A.D. 1912, together with interest at the rate of seven per cent. per annum on all payments as from time to time remaining unpaid until payment, with interest payable on the first day of November, commencing November 1st, 1909. And the balance of four thousand dollars (\$4,000.00) by the assumption, on the completion of the said payments, of a mortgage for four thousand dollars, bearing interest at the rate of seven per cent. per annum. The payment of two hundred dollars (\$200.00) yearly by the vendor on said mortgage, shall be taken into consideration by the purchaser at the time of assuming mortgage."

The above is followed by this printed covenant:

"Now it is hereby agreed between the parties aforesaid in the manner following, that is to say: The purchaser covenant, promise and agree to and with the said vendor, that the purchaser will well and truly pay or cause to be paid to the said vendor the said sum of money, together with the interest thereon at the rate aforesaid on the days and times and manner above mentioned; and also will pay and discharge all taxes, rates and assessments

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wherewith the said land may be rated or charged from and after the seventeenth day of October, A.D. 1908."

Then (omitting part not material to the present purpose), is the following, which I insert because it was relied on in part by the defendant's counsel:

"In consideration whereof and on payment of the said sum of money with interest as aforesaid in manner aforesaid the vendor do covenant, promise and agree to and with the purchaser to convey and assure or cause to be conveyed or assured to the purchaser the parcel of land with the appurtenances as aforesaid."

The only other part which seems to require consideration is a specially inserted provision at the end of the agreement, where it says:

"Provided further that the purchaser shall have the privilege of paying off the whole or any part of the vendor's equity remaining unpaid at any time, without notice or bonus, by paying interest up to date of such payment."

On the execution of this document and the payment of the \$500 in cash, the plaintiff got, and has since held, possession of the property.

The payments of principal money included in the \$5,500 were duly made, except the last one. When the payment due November, 1909, came due, the plaintiff, acting through her husband, claimed that she had only to pay interest upon the unpaid portions of the \$5,500, while the defendant claimed that, from the beginning of the agreement, she was also to pay interest at seven per cent. on the \$4,000 of mortgage which the agreement says the plaintiff was to assume on the completion of the payments; so that, at that date, both parties understood the dispute which has led to the present action.

The plaintiff made the payments of interest as she claims she understood them to be, and the defendant, on receiving such, claimed that he received them only on account.

When the payment due 1st November, 1912, came due, the plaintiff tendered to the defendant the amount which would be due then according to her contention, and the defendant refused to accept it, claiming the greater sum that would be payable on his construction of the agreement. There was some dispute as to the amount so tendered; but I think the above is the effect of what was done.

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No attempt was made, at any time prior to this action, by the defendant to have the agreement reformed, nor did he, in pleading his defence, ask such reformation.

Verbal evidence was taken on both sides, the plaintiff's husband, who negotiated the matter for her, and the defendant flatly contradicting each other as to what the actual intended agreement had been.

The learned trial Judge, while finding such a strong contradiction between the plaintiff's husband and the defendant, did not state to which of them he gave credence. I should imply, from the wording of his judgment, that he was equally impressed by them. He, however, did not decide this, apparently because he thought that the formal agreement, on its face, bore out the defendant's contention. He gave judgment in defendant's favor.

During the trial the defendant's counsel asked to be allowed to claim rectification of the agreement, if the Judge should hold against him on its construction as it stood; but, because of the Judge's finding, that was not further pressed.

Dealing first with the question of rectification. It seems to me that such a claim should not now be entertained. The defendant knew of the dispute as early as November, 1909; but decided to rely on the agreement as it stood. The learned trial Judge made no finding as to the credibility of the different parties, and it seems to me that after this lapse of time defendant should

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not be heard asking for rectification, unless, at least, making a very clear case for such relief, which I think he has not done.

Then, what is to be gathered from the formal agreement itself?

The preliminary agreement which was signed by the defendant was put in evidence as explaining the formal one. After setting out the terms of payment of the \$5,500 "with interest at 7% on all deferred payments," it says: "You are to assume on completion of payments covering my equity a nett mortgage of \$4,000 in addition to the above payment which makes the total purchase price \$9,500." Considering the wording and the use of the word "nett," I do not understand what the foregoing means, unless it is that the mortgage was then, and only then, to be assumed, and that until then there should be no liability as to interest on it.

Then, the formal agreement says: "And the balance of \$4,000 by the assumption, on the completion of the said payments, of a mortgage for \$4,000 bearing interest at the rate of seven per cent. per annum." The words in the preliminary agreement, "on completion of the payments covering my equity," and those in the formal agreement, "on the completion of the said payments," if they have any meaning, surely mean on the completion of the deferred payments of the \$5,500.

Then, immediately after the provision as to the assumption of the \$4,000 mortgage, the formal agreement says: "The payment of two hundred dollars (\$200) yearly by the vendor on said mortgage shall be taken into consideration by the purchaser at the time of assuming mortgage," shewing an intention to specify what was to be done in the assuming of that mortgage.

It will be seen, then, that the defendant did, in the agreement, consider the \$4,000 mortgage to the extent, at least, of saying that he should get the benefit of the



\$200 yearly payments that he might make on it. But he again says nothing as to the interest upon it, or anything to remove the presumption which would arise from the words previously used, "by the assumption on the completion of the said payments." (Meaning the payments making up the \$5,500.)

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It is argued that the covenant which follows that, and which is above set out, is a covenant to pay interest on the full \$9,500. It is a covenant to pay "the said sum of money, together with the interest thereon." It seems to me that the ordinary reading would be that it was applicable to the preceding express provision for payments to the defendant of moneys and interest, and only to that. There is no provision for "payment" of the \$4,000. The plaintiff agrees to "assume" it.

The clause beginning, "In consideration whereof," above quoted, does not, I think, alter the position.

A more troublesome matter to deal with is the specially inserted provision at the end, whereby the plaintiff had the privilege of anticipating payments, and paying off the equity at any time.

It is argued that it would not reasonably have been asked for by the plaintiff's husband, by whose direction the formal agreement was prepared, if she were not to pay interest on the \$4,000 covered by the mortgage, because, if her present contention were correct, she would, by anticipating payments, necessarily make herself liable for interest on the \$4,000 for the length of period by which she so anticipated—a liability which she would not be at all likely to wish to incur.

So far as paying off parts of the equity goes, I do not see that this clause would so far operate as to make the assumption of the mortgage come into effect before the 1st November, 1912, if, while anticipating the others or any of them, she left the final payment unpaid till it came due on the last named date. But the clause enables

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her also to pay off the whole as well as any part. It may be that she felt that she would like to pay off parts of it beforehand so as to stop interest thereon, and that, for that reason, she asked for this clause. If she did so ask for that reason, she would not object to the putting in of the provision that she might pay off the whole. Circumstances might possibly arise under which she would wish to pay off the whole, even though it caused her to assume interest on the \$4,000 for a period for which she would not otherwise be liable, and, as it would be for her to decide whether to avail herself of it, she ran no risk by that provision being in the clause.

It is also argued that the provision as to the \$4,000 is an unusual one, if it implies what the plaintiff claims as to interest. I can only say, as to that, that one finds many unusual clauses in agreements, and, if they appear to be plainly stated, the fact that they are unusual ones is no ground for holding that they were not intended.

On the whole, I am unable to agree with the defendant's contention. Both in the preliminary agreement and in the formal one it is provided that the plaintiff is to assume the \$4,000 on the completion of the payments of the \$5,500 and nothing is said as to interest on the \$4,000 before such completion. Furthermore, the provision as to the vendor being repaid his \$200 payments on principal, if he should make them, would imply that the \$4,000 mortgage question received consideration.

With the utmost deference, I am unable to agree with the construction put upon the agreement by the learned trial Judge. In my opinion its reading is that until the full \$5,500 should be paid, or the time for its final payment should arrive, the plaintiff was not to assume interest on the \$4,000.

I would allow the appeal with costs, the formal judgment to be as stated in the reasons for judgment of my brother Perdue.

PERDUE, J.A. This is an action for specific performance brought by Mrs. Miner, as purchaser of a piece of land, against the vendor of same. The articles of agreement relating to the sale were carefully reduced to writing and executed under seal by each of the parties. The agreement is dated 17th October, 1908. In the agreement it is expressed that the purchaser has agreed to purchase the land therein described,

“at and for the price or sum of nine thousand five hundred dollars (\$9,500) of lawful money of Canada payable”

(See judgment of Richards, J.A., *supra*.)

The whole dispute between the parties is whether the plaintiff, the purchaser, is or is not liable to pay interest at seven per cent. per annum upon the mortgage of \$4,000 from the date of the agreement. The dispute between the parties over this matter arose when the first of the deferred payments fell due in November, 1909. Each of them placed his own construction upon the agreement and payments were made by the plaintiff from time to time and received by the defendant, the latter adhering to his claim and merely giving the plaintiff credit on account for the sums paid. No suit was brought for reformation of the agreement, each party claiming, as I take it, that the instrument expressed sufficiently the meaning that he or she placed upon it.

By a clause in the agreement the plaintiff had the privilege of paying off the whole or any part of the vendor's equity remaining unpaid at any time without notice or bonus by paying interest up to the date of such payment. In pursuance of this the plaintiff, on 12th March, 1912, made a tender of a sum of money which she claimed was the full amount due and demanded a transfer. On refusal by the defendant to accept the sum tendered, the present action was brought.

In the statement of defence, the defendant set out the

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agreement *verbatim*, denied the sufficiency of the tender and offered to perform the agreement upon the plaintiff paying all sums the defendant was entitled to receive under its terms. The defendant also counterclaimed for a balance claimed to be due to him of \$2,424.12. This balance was made up by charging interest on the whole purchase money, including the mortgage, from the date of the agreement, and adding this to the amount of purchase money still due.

No question of fraud, mistake or undue influence was raised by the defendant. The whole question therefore is, what is the true construction of the instrument in regard to the assumption of the mortgage by the purchaser? It is no doubt very unusual that a large part of the purchase money should remain unpaid for four years and bear no interest in the meantime. Still, in the absence of fraud or mistake, neither of which is alleged in this case, the vendor might grant such an unusual term to the purchaser as an inducement to buy. The plaintiff's husband, who conducted the negotiations, positively states that he said to the defendant, "if you wish to get \$9,500 for your property, I will give it to you in this way, I will make these payments each year until the 1st November, 1912, and then I will assume a net mortgage of \$1,000, but you must take charge of the payments in the meantime." The defendant has contradicted this statement, but at the interview at which the negotiations were closed an offer in writing was signed by the defendant embodying the terms he proposed. This offer was drawn up by Miner and signed by the defendant. It was received in evidence, although the defendant objected to it. I think that it may be looked at for the purpose, not of varying or modifying the contract, but of construing the formal instrument subsequently executed by the parties and of shewing what the object of the parties was and what was in their minds

at the time: see *Leggott v. Barrett*, 15 Ch.D. 306, 309. The offer is addressed to Miner, and after setting out the price and the dates of payment of the instalments payable in money it concludes with this sentence: "You are to assume on completion of payments covering my equity a net mortgage of \$4,000 in addition to the above payment, which makes the total purchase price \$9,500." The expression "net mortgage" must mean a mortgage of \$4,000 clear of all charges and deductions.

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But, taking the formal agreement itself, the balance of the purchase money, over and above the payments specifically provided for, is to be paid "by the assumption, on the completion of the said payments, of a mortgage for four thousand dollars bearing interest," etc. No provision is made for the payment of interest on the \$4,000 in the meantime. No provision is made for the payment of interest on the total purchase money, although provision is made for the payment of interest on the \$5,500 payable by instalments. If interest is to accumulate upon or be added to the \$4,000, then the purchaser would be paying more than the agreement calls for.

It is further to be observed that express provision is made in the agreement for the protection of the defendant in respect of the payment by him of \$200 yearly upon the mortgage, by obliging the plaintiff to take such payments into consideration at the time of assuming the mortgage. The silence of the instrument in regard to the interest on the mortgage, a matter of greater moment than the yearly payments of \$200, appears to me to afford the very strongest evidence in favour of the construction sought to be placed upon the instrument by the plaintiff.

I do not think that the terms of the agreement permit the application of the equitable rule imposing interest in the case of certain charges of money upon land stated in *Lippard v. Ricketts*, L.R. 14 Eq. 291, *In re Drax*,

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[1903] 1 Ch. 781, and in other decisions referred to in these cases. I think the intention of the agreement in the present case was that no interest was to be payable by the purchaser on the \$4,000 until the time arrived for her to assume the mortgage.

The appeal should be allowed, and there should be the usual judgment for specific performance of the agreement as interpreted by this Court. There will be a reference if necessary. The plaintiff will be entitled to the costs in the Court of King's Bench and the costs of this appeal.

HAGGART, J.A. On the 17th of October, 1908, the defendant wrote the letter to the plaintiff, which is set out in the judgment of Richards, J.A., *supra*.

The sale proposed in that letter was consummated by a more formal document under the seal of both parties, the provisions for payment of the purchase price, being as follows:

(See judgment of Richards, J.A., *supra*.)

On the date fixed for the first payment of interest, a dispute arose between the parties. The plaintiff contended that the \$4,000 should bear interest from the 1st day of November, 1912, being the last of the instalments fixed for the paying of the \$5,500, and the defendant claimed that the \$4,000 should bear interest from the date of the purchase. The contention of the respective parties was consistently maintained from the first up to this time. The plaintiff brings this action for specific performance.

Both plaintiff's husband (who conducted the negotiations for her) and the defendant are intelligent business men. Both of them either read, or had an opportunity of reading, the document in question. Considerable extrinsic evidence was given with a view of aiding in the interpretation; but I cannot see that it has given much assistance. Neither party charges that there was

any fraud, nor is rectification of the document asked for.

The trial Judge interpreted the agreement to mean that interest ran on the whole \$9,500 from the date of the purchase. With all due respect and deference, I come to a different conclusion.

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It is our duty to look at the document alone and give it that meaning which the words bear. The words "on the completion of the said payments," I think, indicate that the interest was to run on that \$4,000 after the other cash instalments had been paid.

The plaintiff may have been more astute in the making of the bargain; but there is nothing to prevent her from having the benefit of that astuteness.

I would allow the appeal.

HOWELL, C.J.M., and CAMERON, J.A., concurred.

*Appeal allowed.*

## McINNES v. NORDQUIST.

Before CURRAN, J.

*County Court, practice in—Discontinuance—County Courts Act, R.S.M. 1902, c. 38, s. 72—Judgment—Discharge of—Transfer of action to King's Bench—Void proceeding—King's Bench Act, s. 90, Rule 538—Partnership Act, R.S.M. 1902, c. 129, s. 26—Charge on interest of one partner in partnership to secure payment of judgment—Irregularity—Notice of motion instead of summons.*

1. The County Courts Act, R.S.M., 1902, c. 38, contains no provision whereby a plaintiff can discontinue his action as to one of two defendants; and, even if the practice in the King's Bench in cases not expressly provided for in the County Courts Act can be adopted and applied under section 72 of that Act, a plaintiff cannot discontinue as to one defendant after judgment against two, as Rule 538 of the King's Bench Act only permits the filing of a discontinuance before notice of trial is served.
2. A discontinuance, even if properly filed, has not the effect of discharging the party from his liability, and, therefore, has not the effect of discharging a judgment against any other defendant.
3. Section 90 of the King's Bench Act, R.S.M. 1902, c. 40, only permits the transfer of an action from the County Court to the Court

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of King's Bench before trial and "when the defence or counterclaim of the defendant involves matters beyond the jurisdiction of the (County) Court", so that an order of a County Court Judge for such transfer of an action in which the plaintiff has final judgment against two defendants, and in which there had been no defence or counterclaim, is entirely without jurisdiction and is a mere nullity, although it might be well to formally rescind the order so as to restore the action to its former status in the County Court.

*McLeod v. Noble*, (1897) 28 O.R. 528, and *Brooks v. Hodgkinson*, (1859) 4 H. & N. 712, followed.

4. Although, therefore, a plaintiff has filed such a discontinuance and obtained and acted upon such an order of transfer of his action in which he had judgment against two defendants, his judgment is still valid and subsisting and sufficient to found an application under section 26 of the Partnership Act, R.S.M. 1902, c. 129, for an order charging the interest of one of the judgment debtors in a partnership of which he is a member with the payment of the judgment debt.
5. Although section 26 of the Partnership Act provides for an application "by summons," yet, if the plaintiff has given notice of motion instead, and the defendant appears, the irregularity may be disregarded and the motion dealt with as if a summons had in the first instance been formally granted.

ARGUED: 25th September, 1913.

DECIDED: 29th September, 1913.

**Statement.**

THE plaintiff, alleging himself to be a judgment creditor of the defendant John Nordquist, applied in Chambers by way of notice of motion for an order charging the defendant's interest as a member of the firm of Nordquist Bros. in the partnership property and profits with the payment of his judgment under the provisions of section 26 of the Partnership Act, R.S.M. 1902, c. 129.

*J. T. Beaubien* for plaintiff.

*T. S. Ewart* for defendant.

CURRAN, J. This matter came before me on the 22nd September, when defendant was represented by counsel, and took certain objections to the form of the application and the material filed in support.

It was objected that the matter must come up by way of summons and not upon notice of motion. The section



of the Act reads that the Court of King's Bench or a Judge thereof may, "on the application by summons of any judgment creditor," etc. As the parties were before me I did not consider this objection fatal, and decided to deal with the matter as if a summons had in the first instance been formally granted, but adjourned the hearing until the 25th instant to enable the plaintiff to file further material in support of his application, and to give the defendant an opportunity of meeting the whole case then presented.

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Accordingly the application again came before me on the 25th instant and, after hearing argument, I reserved judgment.

The case presents some rather curious incidents in County Court practice, resulting in entanglements that may be difficult to unravel, and a situation that may be hard to adjust.

The plaintiff recovered a judgment in the County Court of Winnipeg on the 9th May, 1912, against John Nordquist and Norman Leonard Jacobs in the sum of \$500 and costs. Execution was issued thereon May 15th, 1912, against both defendants and returned *nulla bona* on the 17th May, 1912. On August 9th, 1913, plaintiff caused to be issued a garnishee order after judgment against the Canadian Pacific Railway Company as garnishees. It appears that the defendant Nordquist is a railway contractor and his firm held a contract for railway work from this Company. In these proceedings the name of the defendant Jacobs was not used, but the action was treated as one solely against Nordquist. On the 3rd September, 1913, the garnishees paid into Court the sum of \$569.35, being the amount called for by the attaching order, at the same time filing an affidavit to the effect that the defendant Nordquist was employed by the garnishees in the capacity of a railway contractor dealing under the name, style and firm of Nordquist

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Bros., admitting an indebtedness in the whole to Nordquist Bros. of \$3,000 and alleging notice of an assignment of such moneys to the Dominion Bank. On the 5th of September following the Dominion Bank filed a notice with the County Court Clerk that their claim had been satisfied, and withdrawing all claim to the money paid into Court.

On the 9th September an order was made in this action by His Honor Judge Paterson setting aside the garnishing order on the Canadian Pacific Railway Company, and directing repayment of the moneys in court, on the ground, I understand, that this money was partnership property and not garnishable for a personal debt of one of the partners.

Before the money could be paid out, however, the plaintiff caused a notice of discontinuance of the action as against the defendant Jacobs to be filed in the County Court on the 10th September, and immediately issued another garnishee order against the clerk of the County Court, thereby tying up the money in his hands.

On the notice of discontinuance being filed the clerk of the County Court struck out the name of the defendant Jacobs from his procedure book, and the second garnishee order was issued in the action as if Nordquist was the only defendant.

Following up this procedure, the plaintiff then applied to the Senior County Court Judge for, and actually obtained, an order, on September 11th, transferring the whole proceedings in the action to the Court of King's Bench. This order was apparently obtained on the strength of an affidavit of Joseph Thomas Beaubien which set forth, amongst other things, the opinion of the deponent that "there are questions involved in this action beyond the jurisdiction of the County Court, and an order is required transferring the whole proceedings herein to the Court of King's Bench." What these questions were

does not appear. In pursuance of this order the papers in the County Court were duly transmitted to the King's Bench and the plaintiff is proceeding on the assumption that this Court is now seized of the whole matter.

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I set out these facts in order to show the extraordinary position in which the plaintiff has now got himself with regard to his County Court action, and also because I must be satisfied that the plaintiff is, in fact, still a judgment creditor of the defendant before I can entertain his application under the Partnership Act.

Defendant contends that the judgment in the County Court no longer exists because of the order of transference to the King's Bench. He further argues that the discontinuance of the action against the defendant Jacobs and his elimination from the County Court records is tantamount to a satisfaction of the judgment as against that defendant and consequently the other defendant, Nordquist, is also released.

I must deal with these objections as best I can. There is no provision in the County Courts Act that I can discover authorizing the filing of a notice of discontinuance at all, and certainly none for such a procedure after judgment. The notice reads as follows: "Take notice that this action is wholly discontinued as against the above defendant Norman Leonard Jacobs," and is signed by the plaintiff's solicitor. Even if the general principles of procedure or practice in the Court of King's Bench in cases not expressly provided for in the County Courts Act can be adopted and applied to the County Courts under section 72 of the County Courts Act, this section would not apply in this case so as to justify the filing of a notice of discontinuance. Rule 538 of the King's Bench Act only permits the filing of a discontinuance before notice of trial is served. It is obvious, therefore, that after trial and judgment this practice of getting rid of an action or party defendant to an action

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J. in the King's Bench could not be resorted to under the King's Bench rules, and certainly could not be adopted in the County Court.

Again, it is evident that the effect of filing such a notice in the King's Bench is not to impair the defendant's alleged liability to the plaintiff, as sub-section (b) of Rule 538 says: "Such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action." In view of this, even if the practice was permissible in the County Court in this case, I do not see how the notice could have the effect of discharging the judgment as against the defendant Jacobs.

I have come to the conclusion that the effect of the notice filed in this case is *nil* and that the striking out from the record in the procedure book of the name of the defendant Jacobs was wholly unwarranted, unauthorized and nugatory.

I think the judgment in that Court is still of the same force and virtue against the defendant Jacobs as it was before that notice was filed. It follows then that the judgment against the defendant Nordquist is not on this account impaired, or affected.

Next, as to the effect of the order transferring the proceedings to this Court. I think that such order must have been made by the learned County Court Judge *per incuriam*, as it seems to me he had absolutely no jurisdiction to make it. The authority for such orders is to be found in section 90 of the King's Bench Act, and is clearly restricted to cases before any County Court "where the defence or counterclaim of the defendant involves matters beyond the jurisdiction of the Court." Here no such question arose. The County Court dealt with the plaintiff's cause of action and awarded him judgment. No defence whatever was filed by either defendant and there was absolutely no question of jurisdiction involved at all. In my opinion the order in question is

a mere nullity and ought to be disregarded: see *McLeod v. Noble*, 28 O.R. 528.

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It is not a case of mere irregularity or of the wrongful, improper or erroneous exercise of jurisdiction when there was jurisdiction, and consequently rendering it necessary to set aside the order before it could be disregarded, but a case of entire want of jurisdiction *ab initio*. It is not even necessary, in my judgment, to have the order rescinded or set aside to avoid giving effect to its provisions, although I think this ought to be done to restore matters to their former status in the County Court. Upon this point, see *Brooks v. Hodgkinson*, 4 H. & N. 712.

I hold, therefore, that the plaintiff has established his status as an unpaid judgment creditor of the defendant John Nordquist, that this defendant is a partner in the firm of Nordquist Bros., entitled apparently to a one-third interest in the partnership property and profits, that such interest may properly be charged with the payment of the plaintiff's judgment debt under section 26 of the Partnership Act, c. 129, R.S.M. 1902, and I think the plaintiff is entitled to the charging order asked for and such order will go accordingly.

I do not think a proper case has been made out for the appointment of a receiver and that portion of the plaintiff's application will be denied.

I think the defendant was justified in opposing the application as first made and that, strictly speaking, I might have properly refused the application with costs. It was a matter of indulgence to the plaintiff allowing the adjournment for the purpose of rectifying defects in his material first filed, and on this account I allow the defendant his costs of the first attendance in Chambers, which I fix at the sum of \$5, and the plaintiff will have the usual costs of one Chamber motion to be taxed and

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**Judgment.** added to his judgment. The plaintiff must, however,  
**CURRAN,** pay the defendant's solicitor his costs as above fixed  
**J.** forthwith.

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PORTAGE FRUIT CO. v. CITY OF PORTAGE LA PRAIRIE.

Before GALT, J.

*Municipality—Drainage—Negligence—Damage by flooding—Obstruction of drains—Notice—Municipal Act, R.S.M. 1902, c. 116, s. 516A enacted by 3 & 4 Edward VII, c. 36, s. 1.*

1. A municipality is not liable under section 516A added to the Municipal Act by section 1 of chapter 36 of 3 & 4 Edw. VII, or any other statute, for damages suffered by a citizen from an overflow of water into his basement caused by a sudden thaw or heavy rains and a stoppage of the drains constructed for the purpose of carrying away the surplus water, unless its officials have had time enough after notice of the obstruction to remove same.
- Rice v. Whilby*, (1898) 25 A.R. 191, followed.
2. A plaintiff cannot recover damages against the municipality caused by water flowing into his basement at a hatchway if he could have kept out the water by slightly banking it up with earth.
3. The non-removal by a municipality of a large quantity of ice left on the ground by the freezing of water that had escaped in the winter from a burst water main, thus adding to the quantity of water that would have to be taken care of at the opening of spring, does not impose any additional obligation on the municipality when the bursting of the main was purely accidental and it was repaired as promptly as possible.

ARGUED: 25th September, 1913.

DECIDED: 8th October, 1913.

**Statement.** THE plaintiffs in this action claimed damages by reason of the defendants' negligence in permitting large quantities of water to accumulate upon Saskatchewan Avenue and Main Street in the City of Portage la Prairie and for negligently conducting said water to the property of the plaintiffs.

W. J. Cooper, K.C., and A. Meighen for plaintiffs.

A. B. Hudson and A. C. Williams for defendants.

GALT, J. The plaintiffs are merchants having their place of business on the west side of Main Street between Victoria and Alice Avenues. The damage in question is said to have arisen during the evening of Saturday, March 29th. It appears from the evidence that the defendants' system of drainage along the district in question consists of a drain on Saskatchewan Avenue (running from the west to the east), thence to a tile drain on Main Street running north along the westerly side of Main Street past the plaintiffs' premises, thence crossing over to the easterly side of Main Street and continuing north underneath the tracks of two or more railways to Pacific Avenue and there having an outlet into an open drain running to the east.

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After the evidence had been completed I had an opportunity of going over the ground with the solicitors for both parties and taking a view thereof.

The drain above mentioned is constructed two feet below the surface of the ground and has a fall of about 18 inches between Saskatchewan Avenue and the plaintiffs' property. The whole surface of the ground in the district in question is very flat and the evidence shows that in the spring of the year melting snow and ice is bound to form pools of water all over the City.

The basement of the plaintiffs' premises is constructed to a depth of four feet below the surface of the ground. The entrance to it is from a hatchway at the back. The sides of this hatchway looked to me to be almost even with the general level of the ground surrounding it, but at the present time there is a slight banking up of earth to a depth of perhaps two inches, brought there by the plaintiffs on the night of the flooding.

There are several openings to the drain down Main Street to admit the carrying off of surface water, including water brought from Saskatchewan Avenue.

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J.

The evidence shows that there was an unusually heavy snowfall in Portage la Prairie during the winter of 1912-13, that a large bank of snow accumulated along Alice Avenue to the north of the plaintiffs' property extending perhaps one hundred yards along the street and most of the way across. It was said that this accumulation of snow was largely due to the presence of a number of engines or trucks placed along the street by the Hart Parr Co. in the fall of 1912. I do not think that anything turns upon this because, if the trucks had not stopped the snow where they did, the same snow must have accumulated against the obstructions belonging to the plaintiffs and their neighbor Purser to the west of them.

In the month of January one of the City water mains burst on Saskatchewan Avenue with the result that a large quantity of water escaped over the surface and was speedily frozen. The plaintiffs contend that the City authorities should have removed this ice before spring-time and that when the spring thaw set in, a day or two before the trouble in question, the melting of this ice added unnecessarily to the melting of the ordinary snow and ice on the street, and imposed an additional obligation on the defendants. I cannot follow this argument at all. The bursting of the main was purely accidental and was repaired as promptly as possible and no inconvenience or danger seems to have occurred to anybody during the winter.

The weather appears to have become warm on the Thursday before the damage in question. One Hancock had been appointed street inspector for the municipality and he was engaged with 19 men on and before the date of the damage in opening up surface drains and otherwise endeavoring to meet the results of the thaw then setting in. By Saturday afternoon a large amount of water had accumulated throughout the City on the



various streets and vacant lots. An additional opening had been made on Saskatchewan Avenue near Main Street to permit the escape of the water accumulating there, with the result that some 5 or 6 inches in depth of the water was carried off into the drain; but some stoppage occurred and the water had ceased to flow. It would appear that some other stoppage had occurred between the plaintiffs' premises and Pacific Avenue, because between 5 and 6 p.m. on Saturday water was being forced up from the drain opening near the corner of Victoria and Main Street and had already risen high enough to reach the sidewalk. This would not require any depth of water, for all the inequalities of ground in the neighborhood are a mere matter of a few inches.

On the other side of Main Street there was an open drain along a portion of the road, but the evidence shows that it was full of water.

At about 3 o'clock on Saturday afternoon the plaintiffs' manager (McKay) left the building for the day. At that time he says that there was considerable snow on the plaintiffs' premises and puddles, but no flow of water; that he noticed water standing in front of the Empire Hotel, which is on the south-west corner of Main Street and Victoria Avenue, but did not see any danger and did not think of any trouble.

Edward Purser, a C.P.R. baggageman, resides in a house on Victoria Street at the back of the plaintiffs' premises. He says that he went home to supper at 5 o'clock on the Saturday and saw water coming through a pipe under the sidewalk at the corner of Main Street and Victoria Avenue. The natural flow of water from this point was shown to be in a north-westerly direction across Victoria Avenue onto the plaintiffs' property and onwards past Purser's property. Purser says that about 6 p.m. he saw Hancock, the inspector, and notified him that he had better go over and look after this water or

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he and the Fruit Company would be drowned out, and Hancock said in reply that he was not any worse off than other people.

The plaintiffs strongly rely upon this conversation between Purser and Hancock to fix the defendants with notice and liability for what happened afterwards. Hancock himself says that he does not recollect any such conversation, but that inquiries and complaints about water were being made by numberless citizens about that time. Another witness said that he thought about one householder out of every three was complaining throughout the City.

At about 8 p.m. McKay says he was telephoned for and he went back to the plaintiffs' building and found between four and six inches of water pouring in all around into the hatchway and more than a foot of water in the basement. He then got the assistance of Graham, the plaintiffs' shipper, and they scraped up enough earth around the hatchway to keep the water from coming in.

I should myself think that, in a locality so flat as the locality in question, it would only have been a reasonable precaution for the plaintiffs to have anticipated an accumulation of water whether during the spring thaws or during a summer thunder storm and, if they had protected the hatchway even to the extent of a few inches, it would have been a complete protection.

Next morning the water was pumped out of the basement and on Monday following Hancock and his men cut an opening through the snow bank on Alice Avenue and also dug or picked a ditch along the west side of Main Street to the north with the result that all the accumulated water was got rid of.

The plaintiffs largely based their claim upon the Municipal Act, as amended in 1904, section 516A, which contains, amongst others, the following provision:

"Nor shall the council of any municipality dam up,

obstruct or leave uncompleted for any unreasonable length of time, or sanction or permit the damming up, construction (obstruction?) or leaving uncompleted for an unreasonable length of time, any road, ditch, drain or other work in or upon any road, highway, street or lane or elsewhere in the municipality, without making full and adequate provision for conveying off the water, and preventing the lodgment of such water on such road, highway, street, lane or other place, or the overflow thereof on contiguous lands, and for the free and uninterrupted use of such road, highway, street or lane."

The obstruction which made itself apparent in the drain, shortly after water had been allowed to flow in it, was not in any way explained and it is said to have disappeared in the course of a few days. Plaintiffs' counsel suggested that probably snow and ice had drifted into the opening near the corner of Saskatchewan Avenue and Main Street and had blocked up the opening there; but no satisfactory explanation was given by anybody. It would look as though the drain had been stopped by ice, for in a few days the trouble was over.

I do not think it can be said that the council of Portage la Prairie did anything amiss or left the drain obstructed for any unreasonable length of time.

I am unable to find any actionable negligence established against the defendants. Nobody appears to have suspected any likelihood of trouble before 5 or 6 o'clock on the Saturday afternoon and then everybody seemed to wake up to the situation. Water is a common enemy, and so far as I can see the snow bank might have been cut through, and the pipe under the sidewalk plugged just as well by Purser or the plaintiffs as by Hancock and his men.

But the crux of the situation lies in the fact that the damage was all occasioned before the trouble was or could be dealt with by the defendants. A large number of people were clamoring for assistance at 6 o'clock when

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in the ordinary course of work Hancock and his men would go to supper. Deflecting the water from one property owner would be almost certain to flood the property of some other owner.

Where negligence is charged against a municipality some reasonable notice of the trouble in question must be brought home to the municipality, and they must be given an opportunity of setting the matter right. In the present instance, if the plaintiffs themselves had notified the City Clerk at 6 o'clock on the Saturday evening, and if the Council had specially met at 8 o'clock to consider the matter, still it would have been too late as the damage had already occurred.

The law applicable to this branch of the case is clearly laid down in *Rice v. Whitby*, 25 A.R. 191, and cases cited therein.

For the above reasons I think that this action must be dismissed. The defendants are entitled to their costs.

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### CHISHOLM v. WODLENGER.

Before METCALFE, J.

#### *Limitation of Actions—Amendment—Parties to action.*

The plaintiff, having a good cause of action against the defendant, commenced this action within the time allowed by the Statute of Limitations, but, by mistake, the action was brought in the names of himself and his partner who had really no right to share in the claim. After the expiration of the statutory period, the statement of claim was amended by striking out the name of the partner as a plaintiff.

*Held*, that this did not affect the plaintiff's right to recover.  
*Ferguson v. Bryans*, (1904) 15 M.R. 171, distinguished.

ARGUED: 10th October, 1913.

DECIDED: 5th December, 1913.

ACTION by the plaintiff, an architect, to recover for plans prepared for defendants.

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Statement.

*J. B. Hugg* for plaintiff.

*E. A. Cohen* for defendants.

METCALFE, J. The plaintiff is an architect. In 1906 the plaintiff was architect for a building near the residence of the defendant Wodlenger and, on attending to inspect this work one day, he met Wodlenger on the street. He had already done some work for Wodlenger. It appears that the defendants owned a lot suitable for the erection of a large building and were then considering the advisability of building on the property.

On the street Wodlenger spoke to the plaintiff about this and, while there is some difference as to exactly what occurred, there is no doubt that Wodlenger instructed the plaintiff to do something towards an estimate for a proposed building, and there is no doubt that the defendant Balcovski subsequently, by ratification, became equally liable with the defendant Wodlenger.

The plaintiff did proceed with the preparation of plans and the preparing of an estimate of the cost of the building. No amount had been agreed upon as his fee. It was no doubt intended that, in the event of building, the work occasioned thereby should become a part of a bill to be subsequently rendered by the plaintiff as architect for the whole contract.

The plaintiff delivered in August, 1906, at the residence of the defendant Wodlenger, the plans and drawings and an estimate of the cost of building. Not having heard further from the defendants, he rendered, in the following January, an account, charging \$843.06 for his services.

Afterwards he saw the defendants, who protested that they had no idea, when they discussed the matter so informally with the plaintiff, that he was going to take

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so much trouble. I have no doubt they were genuinely surprised at the amount of the bill. They told him that they did not then intend building, but if they did build they would be glad to employ him as architect, whereby the work thus incurred would become a part of the whole bill. At that interview the plaintiff does not appear to have objected strenuously to the position taken by the defendants, but he did say that he had incurred \$150 of outlay in the matter. The interview seemed to have been more or less good-natured on both sides. Later the plaintiff happened to meet the defendant Balcovski on the railway platform at Moose Jaw, and a somewhat similar conversation took place.

On the 3rd of April, 1912, "James Chisholm and C. C. Chisholm carrying on business as Chisholm & Son" commenced this action. It subsequently transpired that C. C. Chisholm did not become a partner with his father until after the cause of action arose and by an amendment made in October, 1912, the style of cause was amended so that "James Chisholm" alone brings the action.

The plaintiff applying for leave to amend at the trial, I granted such leave. The defendant was allowed to set up the Statute of Limitations, and the record was thereupon amended.

Although the action as originally constituted was commenced within six years, the defendant says that, by reason of the amendment of October, I must hold, in effect, that the action was commenced as of that date, in which event the claim would be barred by the Statute of Limitations, and he cites in support of that contention *Ferguson v. Bryans*, 15 M.R. 171.

In that case the plaintiff, not a judgment creditor, had brought an action, not for the benefit of creditors generally, to set aside a fraudulent conveyance. Afterwards he amended so as to bring the action on behalf of himself

and all the other creditors. Such amendment was made after the expiration of sixty days from the date of the conveyance. It was there held that the plaintiff was not entitled to the benefit of the sixty days provision of the Assignments Act.

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I do not think that case applies. There the plaintiff had no legal right to bring the action. Here the plaintiff was the sole owner of the cause of action. His son subsequently became his partner. In view of the facts here, surely I must consider that the action, in so far as the Statute of Limitations is concerned, was commenced when the statement of claim was issued.

I have no doubt that in this case the plaintiff honestly proceeded with the work and there is no doubt that he did perform work of considerable value. On the other hand, I have no doubt that the defendants had not absolutely made up their minds to build but, owning the lot, as prudent men they desired to know pretty well where they would stand as to the cost of a building before they finally concluded to build.

While I have no doubt of his employment and while I have no doubt that work and services were performed at the request of the defendants, still I think under the circumstances, knowing that these men were cattlemen and not particularly well versed in other matters, it would have been better had the architect, before incurring such a large bill, told the defendants the approximate cost.

On the other hand, I think that when the defendants got the plaintiff's bill they did wrong in not saying to the plaintiff something to this effect: "We admit the employment. We know that you have done work; but you should have pointed out to us the great trouble it would entail to prepare the information necessary and you should have told us something about the cost, and in

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view of the circumstances, can we not get together and settle the matter?"

Considering all the circumstances, and considering the friendly relations that still seem to exist between these parties, surely, had they both approached the matter in a conciliatory spirit, litigation would not have been necessary.

At the conclusion of the case both counsel asked me to deal with the matter from such a standpoint, and from that point of view to "deal fairly with the parties."

I think it is a case in which justice may very well be done in that way.

I therefore allow the plaintiff \$400 and the costs of a County Court suit, without any right to the defendants to set off.

## HILL v. STAIT.

Before GALT, J.

*Threshers' Lien—Threshers' Lien Act, R. S. M. 1902, c. 167, ss. 2-8—Construction of statutes—Interpretation Act, R. S. M. 1902, c. 89, s. 8 (aaa)—Fixed price or rate of remuneration for threshing—Right of thresher to break into barns or granaries in order to seize and sell grain—Liability of thresher for loss of grain by theft after seizure—Costs.*

1. In view of paragraph (aaa) of section 8 of the Manitoba Interpretation Act, R.S.M. 1902, c. 89, the provisions of the Threshers' Lien Act, R.S.M. 1902, c. 167, should be fairly and liberally construed so as to insure the attainment of its object.

*Elsom v. Ellis*, (1910) 16 W.L.R. 373, not followed.

2. Where the thresher agreed to do the work at the same rate per bushel as another thresher in the neighborhood charged, as to which evidence was given, there was "a fixed price or remuneration" within the meaning of section 2 of the Act, for "*id certum est quod certum reddi potest.*"

*Delbridge v. Pickersgill*, (1912) 21 W.L.R. 285, dissented from.

3. The right of a thresher under the Act is not merely a passive lien, but he may seize and sell the grain to realize his claim.

*Priniveau v. Morden*, (1913) 11 D.L.R. 272, not followed.



4. When the owner of the grain threshed stores it on the premises in barns or granaries which he locks or boards up, and then goes away leaving the premises vacant, the thresher who has seized the grain in exercise of his right under the Act is justified in breaking into the barns or granaries in order to take away and sell the grain, for section 8 of the Act requires that he must sell within 30 days after the right of retention is asserted, otherwise the lien would be lost.

Cases cited in *Maxwell on Statutes*, 3rd ed. 502, referred to.

5. A thresher who has exercised his right of retention under the Act is in the position of a bailee and, in the absence of negligence on his part, is not liable to the owner for grain stolen from the barns or granaries after the seizure.

*Finucane v. Small*, (1795) 1 Esp. 315, followed.

6. When the defendant succeeds on the main question involved in the action and the plaintiff succeeds on a small and almost undefended item in his claim, the defendant should have his costs of the action and the plaintiff his costs of the issue in respect of which he succeeded.

*Forster v. Farquhar*, [1893] 1 Q.B. 564, and *Lund v. Campbell*, (1885) 14 Q.B.D. 821, followed.

ARGUED: 24th September, 1913.

DECIDED: 10th October, 1913.

THE plaintiff Hill resided at Brook, Indiana, and was the owner of certain lands in the Province of Manitoba, which he had rented to the plaintiff Chrisler during the year 1912, and the plaintiffs were together entitled to the crop for that year. Upon the lands were a dwelling house and four outhouses used for storing grain, implements and vehicles, &c. Statement.

The principal claim alleged by the plaintiffs was for damages in respect of a seizure and sale of grain by the defendant, and there was a further item of \$110.10 for goods supplied and services rendered to the defendant.

The defendant denied any indebtedness or liability for damages and pleaded a right to retain certain moneys realized by him from a seizure and sale of the plaintiffs' grain under the provisions of The Threshers' Lien Act. The plaintiff had filed an answer to the defendant's supposed counterclaim, but the defendant merely claimed a set-off.

*W. J. Cooper, K.C.*, and *A. Meighen* for the plaintiffs.

*A. B. Hudson* for the defendant.

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GALT, J. The circumstances out of which the action arose are as follows: Shortly before the harvest of 1912 the plaintiffs employed the defendant to thresh their grain, and Hill left the matter of arranging terms to Chrisler. Chrisler says that Stait agreed to thresh the plaintiffs' grain and charge for his services at the same rate as a man named Smith, who was the principal thresher in the neighborhood.

Stait was examined for discovery, and said, "They asked me if I would thresh for them, and I said I would, and that is all the bargain we ever made." Besides being a thresher, he was a farmer in the neighborhood, and doubtless well acquainted with the charges usually made. I cannot imagine any reason why Chrisler should have invented such a statement as that the charges were to be at the same rate as those charged by Smith, and I think that this reference to Smith's charges must have been made at the time of Stait's employment; but that he forgot about it. I therefore assume the arrangement to be as Chrisler put it.

This man, James Hamilton Smith, was called as a witness for the defence, and stated that if he did the whole thing (that is to say, furnished the machines, men, teams and board for both men and teams, as the defendant did in this case) his charges would be 10c. per bushel for barley and oats and 12c. for wheat. He also stated that these were the usual prices in the neighborhood.

Stait did not personally interview Smith with regard to his charges, but he probably knew, at least approximately, what they were, and in the result he decided to charge 10c. per bushel for all the grain he threshed for the plaintiffs.

The threshing began on October 19th and was completed on October 25th. Stait then made up his bill as follows:

Wheat, 3276 bus. at 10c.....	\$327.60
Oats, 1650 bus. ....	
Barley, 2510 bus. at 10c. ....	416.00
<hr/>	<hr/>
7436	\$743.60

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Shortly after the threshing was completed Stait handed Chrisler his bill and requested some money, but Chrisler explained that he had not yet got the returns and some of the grain had been shipped in Hill's name so he could not pay the bill at the time; but Stait says that Chrisler made no objection to the charges at any time. On several subsequent occasions Stait endeavored to collect the amount of his bill; but Chrisler always put him off.

The plaintiff Hill had arranged for a sale of his stock in the neighborhood to be held on November 8th. Shortly before the sale Stait met Hill and spoke about his account. Hill objected to the amount charged, and said that any way he could not pay until after the sale. Chrisler says that he did object to the defendant's charges on several occasions.

The plaintiffs had shipped 2 carloads of wheat and 1 of barley. Deducting the contents of these 3 cars from the amount threshed by the defendant, there should remain (according to my calculation) 1064 bushels of wheat, 1222 bushels of barley and 1650 bushels of oats. The plaintiffs say that, in addition to the grain of 1912, there was about 500 bushels of oats from the season of 1911 remaining on their property.

Chrisler says that, when he went away from the property a day or two before Hill's sale, he nailed up the doors and windows of the buildings in which the balance of the grain was stored.

On November 8th the sale of Hill's stock took place and an appointment was made between Stait and Hill to meet in Portage la Prairie on the following Wednesday

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with a view to settling up accounts. Stait attended on the day named, but found that Hill had gone south to his home in Indiana a day or two previously, and that Chrisler had also vanished without leaving any address.

The following evidence given by the plaintiff Hill is very material as indicating a perhaps unwilling acceptance of Stait's charges and an intention that Stait should pay himself by shipping a sufficient quantity of the plaintiffs' grain for the purpose:

"Q. Was Chrisler here when you left for Brook?  
A. Yes.

"Q. Where was he going? A. He was going down to the place.

"Q. What for? A. To see Stait about seeing to hauling this grain off and getting his money. He said Stait owed him \$12 hauling; I said 'You go down and have Stait haul that grain out and get his money.'

"Q. And so far as you know Chrisler went to carry out those instructions? A. Yes, sir.

"Q. And those were all the instructions you did give him? A. That is all.

"The Court: Was that the day you were in town?  
A. The day I went away from town. I started for home on Monday morning, and he started down to the farm."

The defendant, finding that the plaintiffs had vanished without paying his bill, consulted his solicitor with a view to placing a threshers' lien on the balance of the grain, which he thereupon did by nailing up notices in conformity with the Act on the various buildings containing the grain, and claiming remuneration at the rate of 10c per bushel. This was done on November 16th. By letter dated the same day and addressed to the plaintiff Hill at Brook, Indiana, the defendant notified him that he had that day seized the grain as a protection against his charges for threshing, amounting to \$743, and that, unless he received the amount before the expiration of five days, he would proceed to sell the grain under The Threshers' Lien Act.

Hill acknowledged this letter on November 22nd. On November 27th the defendant went to the property in question, broke open the out-houses or granaries and began removing the grain which he found there to the elevator at Oakville. The detailed account of all grain which he removed is set forth in the defendant's evidence and pleadings, by which it appears that he took and sold 179 bushels of wheat, 712 bushels of barley and 1544 bushels of oats. Deducting these amounts of grain from the grain which should have been stored in the premises, there is a discrepancy (according to my calculation) of the following amounts: wheat 885 bushels; barley 510 bushels and oats 106 bushels, not taking into account the 500 bushels of oats said by the plaintiffs to have been left from the season of 1911.

So far as the \$110.10 item is concerned, there is practically no dispute in reference to it. About one-half of it was admitted on behalf of the defendant at the trial and the other half of it was proved by the plaintiffs, and the defendant merely stated that he could not remember as to the amount of teaming which was charged for. The plaintiffs are therefore entitled to this item of \$110.10.

The real contest at the trial was upon other branches of the case, the plaintiffs contending that the seizure of their grain was wholly illegal and that in any case the defendant must be held liable for the large amount of grain which disappeared, amounting to some 1500 bushels all told, together with 500 bushels of oats left over from the crop of 1911.

Whatever the legal rights of the parties may be found to be, the plaintiffs certainly behaved very badly towards the defendant in having their entire threshing done by him at his own expense, and then both of them leaving the country as they did for the whole winter without paying the defendant a dollar. In such circumstances

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the defendant was well justified in enforcing whatever rights he could in order to collect his remuneration.

The first question which arises for determination is, what rights, if any, the defendant had to place a threshers' lien upon the grain? The Threshers' Lien Act, R.S.M. 1902, c. 167, contains the following provisions:

"2. In every case in which any person threshes, or causes to be threshed, grain of any kind for another person at or for a fixed price or rate of remuneration, the person who so threshes said grain, or causes the same to be threshed, shall have a right to retain a quantity of such grain for the purpose of securing payment of the said price or remuneration.

"3. The quantity of grain which may be so retained shall be a sufficient amount, computed at the fair market value thereof, less the reasonable cost of hauling the same to and delivering the same at the nearest available market, to pay when sold for the threshing of all grain threshed, by, or by the servants or agents of, the person so retaining the said grain, for the owner of the said grain within thirty days prior to the date when such right of retention is asserted.

"4. Such grain shall be held to be still in the possession of the person by whom or by whose servants or agents it is threshed, and subject to the right of retention herein provided for, although the same has been piled up or placed in bags or other receptacles, unless and until the said grain is sold and delivered to a *bona fide* purchaser and value received therefor and removed from the premises and vicinity where the said grain was threshed, and out of the possession of the person for whom the threshing was done.

"5. The right of retention hereinbefore provided for shall prevail against the owner of such grain, any and all liens, charges, incumbrances, conveyances and claims whatsoever.

"6. The right of retention shall be held to be asserted by any person entitled thereto when such person declares his intention of holding such grain either verbally or in writing, or does any act or uses any language indicating that he has taken or retained, or is about to take or retain possession of such grain," etc.

Section 7 enables the thresher, at the expiration of five days from the time when such right of retention is asserted, to sell said grain at a fair market price, the proceeds thereof to be applied first in payment of the reasonable cost of transporting said grain to market and next in payment of the price or remuneration for threshing and the balance to be paid on demand of the owner.

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Mr. Meighen, on behalf of the plaintiffs, contends, firstly, that the Threshers' Lien Act should be strictly construed, as being in derogation of the Common Law, and he cites in support a case of *Elsom v. Ellis*, 16 W.L.R. 373, where Brown, J., so held as regards The Threshers' Lien Act in force in Saskatchewan. A perusal of our own Threshers' Lien Act satisfies me that ours is distinctly remedial, and the need for such an Act is amply illustrated in the present case. But, apart from this, our Interpretation Act, R.S.M. 1902, c. 89, s. 8 (*aaa*) provides that every Act of the Manitoba Legislature and every provision or enactment thereof shall be deemed remedial, whether its immediate purport be to direct the doing of anything which the Legislature deems to be for the public good, or to prevent or punish the doing of anything which it deems contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

Plaintiffs' counsel next argues that there was no "fixed price or rate of remuneration" as required by section 2 as a condition precedent to the right of lien, and he refers, in support of this point, to *Delbridge v. Pickersgill*, 21 W.L.R. 285. This decision also was based upon the Saskatchewan Act. Johnstone, J., says, in finding against the defendant's right of seizure:

"There was no agreement, I find as a fact, to pay 28

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cents a bushel, as asserted by the defendants, and they had no right or power under the Act to make the seizure they did, nor for the amount they did. I can arrive at no other conclusion, on the evidence, than that there was a contract to thresh; but, in so far as the rate per bushel was concerned, there was no definite arrangement. It was agreed that this rate should be determined by the yield per acre, namely, sixteen cents per bushel, should the yield be as much as ten bushels per acre, but twenty cents per bushel should the yield be less than ten. The yield was greater than ten bushels per acre, and the defendants were entitled to be paid only at the rate of sixteen cents per bushel on 3,718 bushels, or \$594.88."

In that case the defendants had charged almost double the amount to which they were entitled, which, of itself, would, of course, invalidate their lien. The learned Judge had no difficulty in finding the proper amount to which the defendants were entitled as previously fixed by their agreement. Unless, therefore, the Act in force in Saskatchewan requires the thresher to fix a rate per bushel (which our Act certainly does not require) I cannot follow the learned Judge's view. To all such cases I would apply the maxim *certum est quod certum reddi potest*.

There are many ways in which the price or rate of remuneration might be fixed. It might be at a certain rate per bushel of all the various grains to be threshed (as it was in this case), or it might be a lump sum for a given field of grain, or it might be at so much per day, or it might be a separate charge per bushel of various grains.

In the present instance I think that the rate of remuneration was sufficiently fixed, within the meaning of this statute, when Stait (as Chrisler admits) said that his charges would be similar to those charged by Smith. If Stait chose to charge a little less than Smith did, surely the plaintiffs could not complain, and it appears on the evidence that Stait's original charge of 10c. per bushel



on all the grain was well within the figures charged by Smith. It is quite true that the defendant has since reduced his charges somewhat, by charging only 9c. per bushel for the barley and oats which he threshed; but he says he did this simply because there was not sufficient grain to pay his original charges, and he found upon inquiry that some of the threshers in the neighborhood were charging at this lower rate. I think that the beneficial provision of the Act would be rendered abortive, in perhaps a majority of instances, if the strict construction apparently adopted in *Delbridge v. Pickersgill* were applied.

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I think, therefore, that the defendant had a right to a thresher's lien.

The next point urged by Mr. Meighen was that the right given to the unpaid thresher was merely a passive lien and certainly not a right to break into a man's barns and seize and sell his grain. In support of this contention the learned counsel relied upon *Prinneveau v. Morden*, 11 D.L.R., 272. That case was decided under the Threshers' Lien Ordinance of Alberta. Stuart, J., held, (1) that the Ordinance does not confer upon the lienor the right to seize grain by breaking open the granary of the owner and sell the same without resorting to legal process, (2) that the lienor's right is only one of retention and he is guilty of conversion if he sell the grain without resorting to a suit for foreclosure or sale. The Ordinance must differ from our statute, because the latter in section 7 above quoted clearly gives the right of sale without taking legal proceedings in Court. For the same reason I find that under our Act a lienor has not merely a passive lien or right of retention.

Whether the lienholder has a right to break open the granaries or barns of the owner is a more difficult question. In *Hodder v. Williams*, [1895] 2 Q.B. 663, the Court of Appeal in England held that a Sheriff may,

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for the purpose of executing a writ of *feri facias*, break open the outer door of a workshop or other building of a judgment debtor not being his dwelling house or connected therewith.

In *Brown v. Glenn*, 16 Q.B. 254, the Court of Queen's Bench held that a landlord cannot break open the outer door of a stable to levy an ordinary distress for rent. Lord Campbell, C.J., in delivering judgment, says:

"In *Penton v. Browne*, 1 Sid. 186, it was decided, on demurrer, that the outer door of an outhouse might be broken open for the purpose of executing a *feri facias*. This, however, is not inconsistent with our decision; for a distinction may reasonably be made between the powers of an officer acting in execution of legal process and the powers of a private individual who takes the law into his own hands and for his own purposes. There is another well known distinction, that a landlord cannot distrain at all hours, whereas the sheriff is under no such restriction."

The present case is not the levy of an execution by a sheriff, nor is it a distress executed by a landlord.

The apparent object of the statute is to enable the unpaid thresher to pay himself promptly out of the proceeds of the grain which he has threshed. Under section 7 the person who asserts such right of retention may forthwith house or store the grain so retained in his own name and if, at the expiration of five days from the time when such right of retention is asserted by the person entitled to the same, the price or remuneration for which the said grain is held as security be not paid such person may sell the said grain at a fair market price, etc. Then section 8 provides that in all cases the grain retained as security as above shall be sold within thirty days after the right of retention is asserted, unless the owner thereof consents in writing to the same being held unsold for a longer time.

Now suppose, as indeed happened in the present case.

that the owners have their grain threshed, a large part of it sold and paid for and the remaining grain stored in granaries, the doors and windows of which are all nailed up, and then the owners go away for the winter. Mr. Meighen boldly argues that such a line of action on the part of the owners entirely prevents an effectual seizure by the unpaid thresher. I cannot accede to such an argument. I think the statute, by implication, warrants the lien-holder in taking possession of the grain in question whether it is locked up or not, and it does not lie in the mouth of the absent owners to complain if their barns or granaries have to be broken into for the purpose.

The view I take of the defendant's right to break into the granaries is supported by the cases cited in *Maxwell on Statutes*, 3rd ed. 502. In treating of implied powers in statutes, the learned author says:

"In the same way, when powers, privileges or property are granted by a statute, everything indispensable to their exercise or enjoyment is impliedly granted also, as it would be in a grant between private persons. Thus as, by a private grant or reservation of trees, the power of entering on the land where they stand and of cutting them down and carrying them away is impliedly given, or reserved, and, by the grant of mines, power to dig them."

Where the ownership of property is held in common, the law applicable in England to the rights of commoners would seem also to support the view I take. In *Arlett v. Ellis*, (1827) 7 B. & C. 346, it was held that a commoner is justified in pulling down, without doing any unnecessary damage, any erection which obstructs the exercise of his right of common.

In the present case the statute gave a lien and right of possession of the grain in question to the defendant and obliged him to sell the grain within thirty days from asserting his right of lien. It was impossible for the defendant to exercise his statutory rights without breaking into the buildings in question, and there is no sug-

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gestion that in doing so he did more damage to the buildings than was necessary.

The next item to be dealt with is the plaintiffs' claim in respect of about 500 bushels of old oats remaining over from the season of 1911. The evidence is conflicting as to whether any of these old oats remained on the premises at the date of the defendant's taking possession. One of the witnesses, Clyde Clevinger, declares that none were left. David Lynch states that he was in the granaries and did not see any old oats there before he began to thresh, and that he certainly would have noticed if there had been 100 bushels, or any to speak of. On the other hand, several witnesses on behalf of the plaintiffs state that there were some old oats, estimated at about 500 bushels, still remaining when the new oats were deposited in the granary.

Assuming that there were some old oats at the time of the threshing, the plaintiffs, by depositing the newly threshed oats on the top of them, so intermingled the grain that it would be impossible for anyone to separate them, and the most one can do in reference to these old oats would be to place them in the same category as the oats which are said to have disappeared. The question is, which of the parties should bear the loss of the grain which has disappeared?

If the missing grain had been taken away before the date of the seizure by the defendant, it is clear that the defendant cannot be held liable for it. I am quite satisfied that the defendant himself did not take any of this missing grain, and that he has accounted for all the grain he did take away. There is no evidence to show that either of the plaintiffs took the grain. Still it was stolen by somebody.

Assume, now, that the grain was stolen after the date of the defendant's seizure. The defendant had appointed Clyde Clevinger, in the immediate neighborhood, to keep

an eye on the property with a view to protecting the grain, and he was there all of November and December while the grain was being shipped. The defendant, having taken possession of the grain under his lien, was in the position of a bailee. In *Beal on Bailments* I find the following statement of the law, taken from *Story on Bailments*, section 338:

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"The true principle supported by the authorities seems to be that theft *per se* establishes neither responsibility nor irresponsibility in the bailee. If the theft is occasioned by any negligence the bailee is responsible; if without any negligence, he is discharged. Ordinary diligence is not disproved even presumptively by mere theft, but the proper conclusion must be drawn from weighing all the circumstances of the particular case. This is the just doctrine at which the learned mind of Mr. Chancellor Kent has arrived after a large survey of the authorities; and it seems at once rational and convenient."

In *Finucane v. Small*, (1795) 1 Esp. 315, the defendant, a bailee for hire, had received a trunk containing valuables. The valuables were stolen, possibly by some employee of the defendant, but without any imputable negligence of the defendant, and it was held that the plaintiff was not entitled to recover.

For this reason I am of opinion that, whether the missing grain was stolen before or after the defendant's seizure, the loss must fall upon its owners, namely, the plaintiffs.

Mr. Cooper, K.C., on behalf of the plaintiffs, pointed out certain discrepancies in the account claimed by the defendant in his set-off, one being an item of \$1.19, another being that the defendant charged \$5 for each load of grain he carried to the station, whereas it appeared that one or more of the teamsters had only been paid \$3.60 per load. Then Stait charged himself with 150 bushels of grain whereas he got 163, the difference being about \$4.00.

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On the other hand, section 7 provides that the lienholder may sell the grain at a fair market price. It was shown in the present case that the market price of oats during the period in question was about 24c., but the defendant was able to procure about 30c. per bushel from farmers in the neighborhood who otherwise would have had to purchase and carry their oats from more distant points.

I think it is therefore not worth while to take these three or four small items into account, as I have not sufficient material before me to make the account exactly accurate.

If the plaintiff Hill instructed Chrisler, as he said he did, to employ Stait to haul out the grain and get his money, undoubtedly Stait would have charged \$5.00 a load, for that was shown to be the ordinary charge in the neighborhood.

To summarize my conclusions, I find:

1. That the defendant's rate of remuneration for threshing was fixed between the parties;
2. That the defendant acquired a thresher's lien in accordance with the Act.
3. That, the plaintiffs having left the premises and neighborhood, the defendant was justified in breaking into the out-houses for the purpose of seizing and selling the grain therein;
4. That the plaintiffs must bear the loss of any grain which disappeared or was stolen, including the old oats of the year 1911;
5. That the defendant is entitled to retain the amount he received for the grain which he sold;
6. That the plaintiffs are entitled to the sum of \$110.10 above mentioned.

With regard to the question of costs, the plaintiffs have succeeded on a small and almost undefended item of their claim. On the main questions involved in the action the defendant has succeeded.

In *Forster v. Farquhar*, [1893] 1 Q.B. 564, Bowen, L.J., delivering the judgment of the Court of Appeal, says:

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"It has become usual in cases which arise under this rule to cite to us language of the late Master of the Rolls, Sir George Jessel, in the case of *Cooper v. Whittingham*, 15 Ch.D. 501, as if it contained an exhaustive definition of 'good cause' under Order LXV, r. 1. The case of *Cooper v. Whittingham* was not a decision on the meaning of the term 'good cause'. It was an enunciation of a principle upon which, in the opinion of the Master of the Rolls, judges should exercise their discretion under the earlier portion of the rule which relates to actions tried before a judge without a jury. Against any attempt on the part of any Court to impose by definition or otherwise a fetter on the discretion which the law has left to a judge in any particular case this Court has always protested. \* \* Although he has won the action, he may have succeeded only upon a portion of his claim under circumstances which make it more reasonable that he should bear the expense of litigating the remainder than that it should fall on his opponent. The point is not merely whether the litigant has been oppressive in the way he waged his suit or prosecuted his defence, but whether it would be just to make the other side pay. We can get no nearer to a perfect test than the inquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that the costs should follow upon success."

See also *Lowe v. Holme*, 10 Q.B.D. 286, and *Lund v. Campbell*, 14 Q.B.D. 821.

In the present instance I think that justice will be done by adopting, *mutatis mutandis*, the order made in *Lund v. Campbell*, p. 830, and by entering judgment for the defendant with costs of action and by ordering that the plaintiffs have the costs of the issue relating to the \$110.10, the amount of which debt and costs will be deducted from the defendant's costs.

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## ROBINSON V. STARR.

Before CURRAN, J.

*Vendor and purchaser—Agreement of sale—Remedies of vendor on default of payment—Judgment for sale instead of foreclosure—Pleading—Motion for judgment.*

A statement of claim in an action by a vendor of land praying for a sale of the land upon default in payment of an instalment of the purchase money payable under the agreement of sale should, in strictness, set up that the plaintiff is entitled to a vendor's lien for the unpaid purchase money and ask for a declaration by the Court that he is so entitled; but, where facts are alleged from which, as a matter of law, the existence of such lien would be inferred, and there is a distinct prayer for a sale of the land, it will be proper, on motion for judgment in an undefended case, to order a sale.

ARGUED: 26th November, 1913.

DECIDED: 3rd December, 1913.

**Statement.** THE plaintiff brought this action against three defendants, G. L. Starr, F. W. Finch and P. Clyne.

On the 20th May, 1912, Starr entered into an agreement to sell to Finch certain lands in the City of Winnipeg for the sum of \$5,500 payable as follows: \$500 in cash; \$2,500 by the purchaser assuming a mortgage upon the property; \$300 on the 1st December, 1912; \$300 on the 1st June and December of each of the years 1913, 1914 and 1915; \$300 on the 1st June, 1916, and the balance on the 1st December, 1916, with interest.

The agreement contained a proviso that all interest becoming overdue should forthwith be treated as purchase money and bear interest, and, in the event of default being made in the payment of principal, interest, taxes or premiums of insurance, or of any part thereof, the whole purchase money should become due and payable.

On the 14th November, 1912, Starr assigned the agreement to the plaintiff Robinson. Finch made default in payment of the instalment of principal and interest which fell due on the 1st June, 1913, and also made default in payment of the mortgage which he had assumed. The plaintiff had been required to pay \$127.10, the insurance and overdue interest on such mortgage.



Clyne was in possession of the lands and premises and claimed that he was a purchaser of the lands from Finch. Plaintiff had notified defendants of the various defaults made and demanded payment from each of them for the sums overdue. She had also demanded from Clyne possession of the lands. 1913.  
Statement.

The plaintiff claimed as follows:—

A. Judgment against the defendants Finch and Starr for the sum of \$2,200 with interest thereon at the rate of 6 per cent per annum from the first day of December, 1912, until judgment, and for the sum of \$127.10 with interest thereon at seven per cent per annum from the 1st day of September, 1913.

B. That a time be fixed for the payment of the above amount due to the plaintiff and that the defendants may be ordered to pay the same within the time so fixed, together with the plaintiff's costs of this action and in default the said lands be ordered to be sold and the proceeds applied in or towards the payment of the plaintiff's said claim, and that the defendants Starr and Finch do pay the deficiency, if any, after the said sale.

C. That the defendants Starr and Finch be ordered to indemnify and save harmless the plaintiff from the payment of the money due and owing upon the mortgage to the Credit Foncier Franco Canadian and be ordered to pay forthwith such moneys to the plaintiff, or the said mortgagees, or into this Court.

D. That the defendants Finch and Clyne be ordered to deliver up immediate possession of the said lands and premises to the plaintiff and to pay for the use and occupation thereof from the first day of December, 1912.

E. For the purposes aforesaid that all proper directions be given and accounts taken.

F. The costs of this action.

G. Such other order and relief as to this Honorable Court may seem just.

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Judgment.  
CURRAN,  
J.

The matter came up by way of motion for judgment.

A. *Monkman* for the plaintiff.

No one appeared for the defendants.

CURRAN, J. I think the plaintiff is entitled to the following judgment:

1. As prayed for in clause A. of the prayer for relief;
2. As prayed for in clause B. of the prayer for relief, except that there will be no order for payment of deficiency, if any, arising from the sale. As to this the plaintiff will have liberty after the sale, if there be a deficiency, to apply to the Court for such an order, and, if there be a surplus, the defendants will have liberty to apply to the Court for payment to them, or such of them as may be entitled thereto, of any such surplus.

3. I appoint three months from the date of judgment within which the defendants, or some of them, must pay into Court the amount found due the plaintiff and, in default, the usual order for sale under the direction of this Court.

I refuse judgment as prayed in clauses C. and D. of the prayer for relief. I think the statement of claim is defective in failing to allege that the plaintiff is entitled to a vendor's lien for his unpaid purchase money, and in not asking for a declaration of the Court that she is so entitled; but, in view of the specific prayer for relief as contained in paragraph B. of the claim for relief, I think this may be overlooked, as the defendants certainly had clear intimation that the plaintiff was asking for a sale of the lands in any event, and perhaps the Court ought to draw from the allegations of fact in the body of the pleading the inference, as a matter of law, that the plaintiff's right to such lien as an unpaid vendor existed whether specially pleaded or not. The costs of the action to be taxed will of course be added to the plaintiff's claim.

## RE GIMLI ELECTION. (No. 2.)

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*Election petition—Manitoba Controverted Elections Act, R.S.M. 1902, c. 34, s. 37—Extension of time for filing preliminary objections—Successive orders to extend time—Manitoba Interpretation Act, R.S.M. 1902, c. 89, s. 8 (m).*

Under section 37 of the Manitoba Controverted Elections Act, R.S.M. 1902, c. 34, a Judge has power, if he sees fit, to make more than one order to extend the time for the respondent to file preliminary objections to an election petition.

So held by PERDUE, CAMERON and HAGGART, J.J.A., following *Payne v. Deakle*, (1809) 1 Taunt. 509, and distinguishing *Power v. Griffin*, (1902) 33 S.C.R. 39.

HOWELL, C.J.M., and RICHARDS, J.A., dissented, following *Power v. Griffin*, *supra*.

*Per CAMERON, J.A., Paragraph (m) of section 5 of the Manitoba Interpretation Act, R.S.M. 1902, c. 89, which says that "words importing the singular number . . . only include more persons, parties or things of the same kind than one", would justify the interpretation of the word "time" in section 37 as if it meant "time (or times)."*

ARGUED: 14th November, 1913.

DECIDED: 20th November, 1913.

THE petition in this case was served on 25th July, 1913. On 28th July, Mathers, C.J.K.B., made an order extending the time for filing preliminary objections until the expiration of two days after the application to set aside certain orders relating to the service of the petition should be disposed of. That application was finally disposed of by the Court of Appeal on 27th October. On 29th October a second order was made extending the time for filing the preliminary objections up to and including the 31st day of October. On the last mentioned date an *ex parte* order was made by Galt, J., further extending the time for filing preliminary objections up to and including 3rd November, or until the application by the respondent to remove the petition from the files of the Court should be disposed of. On 6th November, Galt, J., made a further order extending the time for filing preliminary objections up to and including the day upon

Statement.

1913, which judgment on the appeals from that order itself and  
Statement. from the order of 3rd November should be pronounced  
by the Court of Appeal. The present appeal was brought  
from the above order of the 6th November.

The ground of the appeal was that a Judge had no power under the Manitoba Controverted Elections Act to make a second order to extend the time for filing preliminary objections.

A. B. Hudson for petitioner cited *Re Peterborough Election*, 41 S.C.R. 410; *Re Marquette Election*, 11 M.R. 381; *Charge v. Farhall*, 4 B. & C. 865; *Wilson v. Hunt*, 1 Chitty, 647; *Belcher v. Goodered*, 4 C.B. 472; *Re Assiniboia Election*, 4 M.R. 328, and *Young v. Hopkins*, 9 M.R. 310.

A. J. Andrews, K.C., and F. M. Burbidge for the respondent cited *McLeod v. Gibson*, 35 N.B.R. 376; *Re Glengarry Election*, 14 S.C.R. 453; *Re North Perth Election*, 18 O.L.R. 661; *Re Morris Election*, 17 M.R. 330; *Re Provencher Election*, 22 M.R. 6; *Re Bothwell Election*, 9 P.R. 485; *Alexander v. McAllister*, 34 N.B.R. 163; *Payne v. Beakle*, 1 Taunt. 509; *Allan v. Kennedy*, 2 Terr. 285; *Robertson v. White*, 5 Terr. Rep. 311, and *Re Lisgar Election*, 20 S.C.R. 1.

HOWELL, C.J.M. In a carefully considered judgment made in this matter, and reported in 23 M.R., 678, the Chief Justice of the King's Bench held that the power given to a Judge to extend the time provided for by section 33 of the Controverted Elections Act, R.S.M. 1902, c. 34, was only elaborated by section 34, and that it gave power to extend only once.

On appeal to this Court my brothers Richards and Haggart agreed with him and my brother Perdue and I held that, because of section 34, there was power under the two sections to enlarge the time more than once.

The real point in controversy in this appeal is whether

a Judge under section 37 has power to extend the time more than once.

In the early part of the 19th century, by three cases in the Common Pleas—*Payne v. Deakle*, 1 Taunt. 509; *Barrett v. Parry*, 4 Taunt. 658, and *Leggett v. Finlay*, 6 Bing. 255, and by a case in the King's Bench, of *Anon*, 2 Chitty, 45, it seems to be laid down as law that an arbitrator, having power to enlarge the time for making his award, may exercise that power from time to time and *Russell on Arbitration*, at 147, on the strength of the above cases, states this to be the law. In not one of the cases is the clause giving the power of enlargement set forth, but merely the substance of it is stated. Perhaps there were other clauses or language which led Lord Mansfield to give the broader meaning to the clause in the first case on the subject. It was argued in some of these cases that after one enlargement the arbitrator was *functus officio*.

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Judgment.  
HOWELL,  
C.J.M.

It was deemed necessary in England by the Interpretation Act of 1889, sec. 32, s.s. 1, to provide that in construing such power to enlarge the time as is provided by section 37, it shall be deemed power to enlarge "from time to time as occasion requires" and *Craie* in his *Statute Law*, at 243, states "The substantial effect of the provision is to rebut the presumption that the power is exhausted by a single exercise."

By the Act of Union with Ireland, the Crown was empowered to assume such Royal style and title as by proclamation His Majesty shall be pleased to appoint, and, this having been done, it was deemed necessary to pass legislation to permit another proclamation: See *Craie's Statute Law*, 251.

It is significant that the English Order 64, Rule 7, the Ontario Rule 353 and our Rule 385 all provide for extending the time even if an order has already been made on the subject.

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Judgment.  
HOWELL,  
C.J.M.

With this law before me, I must now consider the case of *Power v. Griffin*, 33 S.C.R. 39. In that case the statute provided that the Commissioner "may at any time \* \* \* grant to the patentee an extension of the term of two years." The Court unanimously, after full consideration, held that, once an extension of time was granted, the Commissioner was *functus officio*. The Chief Justice, at 43, says:

"There is no possible room under the wording of the statute for the contention that the Commissioner could extend this delay from time to time, and jurisdiction of this nature cannot be extended by construction."

Mr. Justice Armour, at 49, says:

"The words used in granting the power authorize only one extension and, by the grant of the extension of the 8th of June, 1901, the power was exhausted."

In the matter before us the power given is "within such further time as any Judge shall grant for that purpose." Of course our Rule 385 cannot be invoked and the power to extend the time fixed by statute can only be derived from these words. The "further time" above referred to, to be granted by "any Judge", is certainly as single in its meaning as "an extension" mentioned in the last cited case. To hold the order appealed from good is to hold that these words mean "within such further time as any Judge shall grant for that purpose and within any still further time that any other Judge shall grant."

Orders had been made under this section granting further time and then the order appealed from was granted. I think there was no power to make the order.

RICHARDS, J.A. Section 37 of the Manitoba Controverted Elections Act, R.S.M. 1902, c. 34, allows the respondent to file preliminary objections "within five days after the service of the petition \* \* \* or within such further time as any Judge shall grant for that purpose."

The question is whether, after one extension of time has been so granted by a Judge, further such extensions can be granted by the same, or another, Judge.

The wording of section 13 of the Act does not seem to me to sustain the argument advanced by counsel for the respondent, that it brings into the Act the provisions of section 87 of the Dominion Act. I think the last named section 87 deals with more than "principles and practice." It confers distinct and important powers on the Court and its Judges, by enabling them "to extend from time to time the period limited" by the Act "for taking any steps or proceedings."

I am still of the opinion, stated in effect in my judgment of 27th October last in this case, on the appeal from an order of Chief Justice Mathers, that Acts delegating powers of Legislatures should be strictly construed, and should not be held to confer powers which are not given on the face of such Acts or by necessary implication.

I think that only one power to extend time by a Judge is given by section 37, and that that power is exhausted by being once exercised.

If a contrary view had been taken by the majority of this Court on the above appeal from the order of the Chief Justice of the King's Bench, I should now be bound by that decision. But, as I understand their judgments, they merely held that each of sections 33 and 34 gave a separate power to grant further time for service of the petition, thereby empowering the learned Chief Justice to make each of the two orders for extension which were in question, the second of which he subsequently held had been unauthorized by those sections. There was no holding by a majority of the Judges that the Act enabled any power for extension of time given to a Judge to be exercised from time to time or oftener than is distinctly stated on the face of the Act.

I would allow the appeal.

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Judgment.  
RICHARDS,  
J.A.

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Judgment.  
PERDUE,  
J.A.

PERDUE, J.A. This appeal turns upon the construction of section 37 of the Act. That section is as follows:

"37. Within five days after the service of the petition as hereinbefore described, or within such further time as any Judge shall grant for that purpose, the respondent may produce in writing any preliminary objections or grounds of insufficiency, which he may have to urge against the petitioner or against the petition, or against the security, or against any further proceedings thereon; he shall in such case at the same time file a copy of such objections or grounds for the petitioner."

It is argued that, under a proper construction of the above section, a Judge has power to grant only one extension of time and that, after the first order had been made by Mathers, C.J., extending the time for filing preliminary objections, a Judge of the Court had no power to grant a further extension. If effect has to be given to this contention, the result may be that, the time having passed for the filing of preliminary objections, no preliminary objections filed after that time can properly be considered by the Court. Such a result might seriously affect the respondent's position. He might be debarred from raising questions of status or insufficiency of security, which should properly be raised by preliminary objection and which might be vital in their character. That such questions are properly the subject of preliminary objection, and can only be raised by preliminary objection, is, I think, settled by the judgments of the Supreme Court of Canada in the *Stanstead Case*, 20 S.O.R. 12, 25, and the *Prescott Case*, 20 S.C.R. 196. See also *Brassard v. Langerin*, 2 S.C.R. 319, at page 327.

In an application under the present petition to set aside a second order to extend the time for service of the petition, Mathers, C.J., held that a Judge had, under section 33 of the Act, power to make only one order and that he was then *functus officio*. On appeal to this Court, the majority of the Court, in allowing the appeal, did



not find it necessary expressly to decide that point. The only authority cited in support of the petitioners' contention was *Power v. Griffin*, 33 S.C.R. 39, an authority which was relied upon by Mathers, C.J., in giving his decision. But, upon a careful examination of it, I think the facts and circumstances of that case were essentially different from those involved in the application now under consideration. In *Power v. Griffin* the statute enabled an official, at any time not more than three months before the expiration of the term for the commencement of a certain operation, to grant an extension of such term. The official granted one extension and then, long after the lapse of the three months, granted a further extension. It was held that the statute gave him no authority to grant the second extension. It is obvious that the power there conferred was quite different from one enabling a Judge of the Court to grant further time for taking a proceeding in a cause pending in his Court. In the one a restricted authority was given, which could only be exercised within a definite period, in the other the authority to extend the time is conferred in general terms.

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Judgment.  
PERDUE,  
J.A.

In construing a statute it is the duty of the Court, in so far as it can, to ascertain and give effect to the intention of the Legislature in passing it. The words, "or within such further time as any Judge shall grant for that purpose", show that the intention of the Legislature was to confer upon a Judge of the Court of King's Bench power to extend the time for filing preliminary objections. The main object of this provision, contained in the words above cited, was the granting of power to extend the time for filing preliminary objections. Whether that extension should be granted by one order or by more than one, was a matter of quite subordinate interest. If circumstances arose which rendered the first extension of time insufficient to meet the requirements of the case,

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Judgment.  
PERDUE,  
J.A.

I do not think that it was the intention of the Act that the Judge should be powerless to grant a further extension.

In *Payne v. Deakle*, 1 Taunt. 509, an order had been made at *Nisi prius* referring the cause to arbitration, so that the arbitrator should make his award on or before a certain date, "or on or before any other day to which he should enlarge the time for making his award." The arbitrator enlarged the time to a certain date and again enlarged it to a still later date. Lord Mansfield, in giving the judgment of the Court, said: "The sense of the condition is, that the arbitrator shall have sufficient time to make his award, and that, if he cannot make it by the day named, he is to make it at any time that he pleases; and whether he names the ultimate day at once, or at a subsequent time, is immaterial." I regard the above as an authority in point. I do not think that there is any fundamental distinction to be observed in construing the judicial order above referred to and the statutory provision now under consideration.

I think the appeal should be dismissed. The costs should be costs in the cause to the respondent.

CAMERON, J.A. If, in section 39 of the Controverted Elections Act, the words, "or within such further time as any Judge shall grant for that purpose", are to receive the construction which it is contended by appellant's counsel they must, then it is, in my opinion, clear that they cannot be affected by the provisions of section 13, and it is immaterial whether section 87 of the Dominion Controverted Elections Act, or the relative English rules (if any), are to be considered as part of our Act or necessarily supplemental or incidental thereto. If section 87 or the English rules are at variance or inconsistent with section 39, they are irrelevant and need not be considered on this appeal. The whole question, therefore, before us on this branch of this appeal is whether

the words quoted must be given the rigid construction above indicated.

That an extension of time can be granted under the section though the time prescribed has elapsed is well settled. The cases are collected and discussed by Mr. Justice Richards in *Re Provencher*, 22 M.R. 6. I refer more particularly to the *Burrard Case*, 32 C.L.J. 638; *Alexander v. McAllister*, 34 N.B.R. 163; *Re Bothwell*, 9 P.R. 485; *Wheeler v. Gibbs*, 3 S.C.R. 374; *Stratton v. Burnham*, 41 S.C.R. 410 and *Eaton v. Storer*, 22 Ch.D. 91.

The argument against the above construction was plainly that there is no express provision for an extension after the expiration of the statutory time, and, in the absence of such a provision, the application must be made before the original time has elapsed, because, the time having elapsed, there was nothing remaining to extend. This was the argument advanced by eminent counsel in *Banner v. Johnston*, L.R. 5 H.L. 157. The section of the Companies Act, 1862, (sec. 124), in question is given at p. 162. The construction of that section is discussed by Lord Hatherley at p. 170, and Lord Cairns at p. 172. The House of Lords, in view of the circumstances that might arise in connection with an appeal, and which must have been in contemplation of the Legislature, refused to give the section in question the narrow construction for which counsel argued.

The circumstances which may make it necessary to apply for an extension of time under s. 39 may not be known until it is impossible to obtain an order giving further time within the five days prescribed, or some unforeseen occurrence may have prevented the filing of the objections within the proper time. Such considerations as these are amongst those that have influenced the Courts in deciding to allow appeals to be lodged, even if the time originally prescribed for entering the appeal

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Judgment.

CAMERON,  
J.A.

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Judgment.  
CAMERON,  
J.A.

has elapsed and there be no express provision made for an application after the time has passed. This reasoning seems to me applicable here. A Judge in fixing an extension of time, having in view the policy of the Act that petitions must be disposed of with all convenient despatch, may have fixed a short further period within which the objections must be filed. Then, unforeseen circumstances may arise making the filing within that time impossible. Can it be that there would then be no further power to grant an extension even for twenty-four hours? To exclude such a meaning from the words above quoted, would it not be necessary to read them as if they were "or within one such further period of time as any Judge shall grant for that purpose?" I must say that I find it impossible to avoid that conclusion. And yet that would be, in my opinion, to read into the section something that is not now there.

The power given to the Judge is discretionary, and it must be assumed that no extension will be granted except for good cause. It cannot be well argued, therefore, that a liberal construction of the words quoted would lead to confusion or undue delay.

The word "time" in the words quoted is obviously not used in its wide, general sense; but in its meaning of "a part of time considered as distinct from other parts." To my mind it connotes the further meaning of "times." It means precisely what is conveyed by the phrase "period of time." And if that phrase were inserted instead of the word "time" it would seem to me necessarily to convey the further meaning of "periods of time." The use of the singular naturally conveys the plural meaning. Moreover, this is in accordance with the rule of construction prescribed by sub-section (m) of section 8 of the Interpretation Act. If I am correct in this view, then the words in question are to be read as if they stood "within such further time (or times)" or "within such further

period (or periods) of time." This is the construction that appeals to me as consonant with the language used, with the intention of the Legislature, so far as I can gather it, and with a regard to the varying circumstances that may arise in connection with the procedure, and which it is fair to consider that the Legislature had in view.

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Judgment.  
CAMERON,  
J.A.

In reference to *Power v. Griffin*, 33 S.C.R. 39, I feel that the Supreme Court was influenced in its decision by the wording of the section there in question as set out at p. 42. The authority of the Commissioner to extend must, under the wording of the section, be exercised at a time "not more than three months before the expiration" of the two years. This seems to me such an express limitation of the authority of the Commissioner requiring him to grant his extension within the three months, if he makes it at all, that it is easy to see how the Court arrived at the conclusion that the last extension, granted during the currency of the first extension properly made, was "absolutely unauthorized by the statute." The explicit declaration of the time within which the power was to be exercised necessarily excluded any other time wherein an extension could be granted.

The arbitration cases which were referred to on the previous argument by Mr. Hudson, and on this appeal by Mr. Andrews, seem to me to have some bearing on the case, and tend to reinforce the view which I have formed. I refer to *Payne v. Deakle*, 1 Taunt. 509, where an arbitrator in an arbitration under an order of reference, enlarged the time for making his award after having once enlarged it as empowered by the order. It was held by Lord Mansfield that the sense of the condition was that the arbitrator should have sufficient time to make his award and that, if he could not make it by the day named, he could make it at any time he fixed. Also to *Barrett v. Parry*, 4 Taunt. 658. There was at the time of these

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Judgment.  
CAMERON,  
J.A.

decisions no statute giving arbitrators the power thus given them by the Courts.

On the whole, I am of the opinion that Mr. Justice Galt had power to make the order appealed from, though I am sensible that the question raised is one of difficulty.

The point is taken that the order should not have been granted as it is in contravention of the policy of the Act that proceedings in these election matters should be expedited. The objection could have been taken by way of preliminary objection and not by way of substantive application. Authority was cited to show that the point as to service could have been raised by preliminary objection: *Re West Peterboro*, 41 S.C.R. 410. On the other hand, it is contended that the proceeding actually taken was in accordance with precedent, and that under the wording of section 39 the taking of the objection as a preliminary objection might have been open to the construction of a waiver of irregularity. As the respondent's proceeding to set aside service was regularly taken, I think this objection cannot be sustained.

It is also objected that the order before us was, by the delay in taking it out, abandoned. The question of abandonment must be one of intention, and, if there be here any *prima facie* evidence of abandonment, it is shown by the lapse of time from November 3 to November 6. But that delay is fairly accounted for by the difference of opinion between the solicitors for the parties as to the terms of the order, to which reference is made in the learned Judge's reasons for judgment.

In the circumstances I am not prepared to hold that there was an abandonment of the order by the respondent. The order, on its face, recites that, on November 3, a verbal order was made extending the time for filing preliminary objections as therein set forth and that the parties had, on November 6, attended before the learned Judge and had then spoken to the minutes of the order

to be made. This would take the order out of the rule debarring the Court from going behind the date appearing on the face of the order, as stated in *Young v. Hopkins*, 9 M.R. p. 312. Moreover, if the time for filing had elapsed after November 3, and before November 6, that, of itself, would not have deprived the Judge of jurisdiction to make the order.

In my opinion the appeal must be refused.

HAGGART, J.A., concurred with Perdue and Cameron, J.J.A.

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Judgment.  
CAMERON,  
J.A.

### RE GIMLI ELECTION. (No. 3.)

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*Election petition—Manitoba Controverted Elections Act, R.S.M. 1902, c. 34—Judgment on interlocutory application—Leave to appeal to Privy Council.*

As the Judicial Committee of the Privy Council has, in *Theberge v. Laudry*, (1876) 2 A.C. 107, *Valin v. Langlois*, (1879) 5 A.C. 115 *Kennedy v. Purcell*, (1888) 4 T.L.R. 664, and *Moses v. Parker*, [1896] A.C. 245, plainly decided that, except possibly on the question whether an Act is *ultra vires* of the Legislature, the Royal prerogative to hear an appeal does not extend to cases under Controverted Elections Acts, and that, even if it did so extend, they would not advise its exercise, except perhaps in the case of an appeal on that question of *ultra vires*, leave to appeal to the Privy Council, from decision of the Court of Appeal in an interlocutory matter in connection with proceedings on a petition under the Manitoba Controverted Elections Act, R.S.M. 1902, c. 34, should not be granted by the Court, especially when no such question of *ultra vires* has been raised.

ARGUED: 14th November, 1913.

DECIDED: 20th November, 1913.

PETITION by respondent for leave to appeal to the Statement.  
Judicial Committee of the Privy Council from two orders made by the Court of Appeal on appeals taken from an order of Mathers, C.J.K.B., and an order of Galt, J., both made in interlocutory matters.

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Argument.

*A. J. Andrews, K.C., and F. M. Burbidge* for the respondent, petitioner for leave to appeal, cited *Valin v. Langlois*, 5 A.C. 122; *Théberge v. Laudry*, 2 A.C. 102; *Rex v. Townsend*, 12 Can. Crim. Cas. 509; and *Webb v. Outtrim*, [1907] A.C. 81.

*A. B. Hudson, contra*, cited *Théberge v. Laudry, supra*; *Valin v. Langlois, supra*; *Kennedy v. Purcell*, 59 L.T. 279; *Moses v. Parker*, [1896] A.C. 245, and *Re Wi Matua*, [1908] A.C. 448.

RICHARDS, J.A. In the matter of the application for leave to appeal to the Judicial Committee of the Privy Council from two decisions of this Court setting aside orders made in interlocutory matters by Chief Justice Mathers and Mr. Justice Galt respectively.

The King was the original fountain of justice, and, at first, he personally administered justice. In the course of time he appointed, first certain of the great lords, and afterwards Courts, composed of judges, to exercise for him this duty. But he has never parted with his prerogative right to finally deal with such cases, though he has in fact delegated the actual hearing of the final appeals to certain of his Privy Councillors, who are called the Judicial Committee of the Privy Council, and who advise him what disposal to make of such appeals. In this way his prerogative has been retained in all cases of ordinary law which his Courts, as such, had the power to decide.

Until the passing of Controverted Elections Acts, the matter of dealing with disputes as to the validity of elections of members of Legislatures, was wholly exercised by such Legislatures. Their right to do so was jealously guarded by them, and the King possessed no prerogative right to interfere with their decisions thereon.

In very recent times Legislatures have, for purposes of convenience, delegated certain of their powers to Courts specifically named by them, to deal with Controverted



Elections. The Act, R.S.M. 1902, c. 34, under which the election for the Electoral Division of Gimli is now being contested, was enacted by the Legislative Assembly of Manitoba for that purpose.

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In passing that Act the Legislature have not divested themselves of the power to repeal the Act and re-assume the exercise of their functions, which they have thereby delegated.

The question of the right to appeal to their Lordships of the Judicial Committee in such cases has been discussed by the members of that Court in several cases.

In *Théberge v. Laudry*, 2 A.C. at p. 107, Lord Cairns (in 1876) in delivering the judgment of their Lordships on an application for leave to appeal, says:

"Now the subject matter, as has been said, of the legislation is extremely peculiar. It concerns the rights and privileges of the electors and of the Legislative Assembly to which they elect members. These rights and privileges have always in every colony, following the example of the Mother Country, been jealously maintained and guarded by the Legislative Assembly. Above all, they have been looked upon as rights and privileges which pertain to the Legislative Assembly, in complete independence of the Crown, so far as they properly exist."

Again, at page 108, he says:

"Their Lordships have to consider, not whether there are express words here taking away prerogative, but whether there ever was the intention of creating this tribunal with the ordinary incident of an appeal to the Crown."

And at page 109, referring to the provisions of the Provincial Act disqualifying for corrupt practices, he further says:

"Mr. Benjamin contended that the Act of Parliament, so far as it engrafted on the decision of the Judge this declaration of incapacity, was *ultra vires* of the power of the Legislature of the Province. Upon that point their

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Lordships do not think it necessary to express any opinion whatever. If the Act of Parliament was in this respect, as contended, *ultra vires* of the Provincial Legislature, the only result will be that the consequence declared by this section of the Act of Parliament will not enure against and will not affect the petitioner; but it is not a subject which should lead to any different determination with regard to that part of the case."

Counsel for the petitioner for leave to appeal (the respondent in the matter of the election petition) argued that in *Valin v. Langlois*, 5 A.C. 115, their Lordships had indicated that the prerogative of the Crown, to grant an appeal, could be exercised in proceedings under Controverted Election Acts.

As I understand that case, the sole question raised before their Lordships, on the application for leave, was whether the Parliament of Canada had power to authorize Provincial Courts to deal with Controverted Elections of Members of that Parliament. The Supreme Court of Canada, from which the appeal was sought, had held that Parliament had that power. Their Lordships upheld that decision in refusing leave to appeal.

Lord Selborne, in giving the judgment of the Court, says at page 122:

"If indeed the able arguments which have been offered had produced in the minds of their Lordships any doubt of the soundness of the decision of the Court of Appeal, their Lordships would have felt it their duty to advise Her Majesty to grant the leave which is now asked for."

In the above the Court referred to as "the Court of Appeal" is apparently the Supreme Court of Canada: and, in mentioning the decision of that Court, I understand the language above quoted to refer only to its holding that Parliament had the power to authorize Provincial Courts to deal with controverted elections. So that it was only with regard to the question, whether the Act was, or was not, *ultra vires* of that Parliament,

that their Lordships implied a power, on their part, to grant leave to appeal.

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In *Cushing v. Dupuy*, 5 A.C. 409, the judgment of the Judicial Committee says, at page 419, in discussing *Théberge v. Laudry*:

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"It was held by this Committee that there was no prerogative right in the Crown to review the judgment of the Supreme Court upon an election petition, and the application was refused. This decision turned on the peculiar nature of the jurisdiction delegated to the Superior Court, and not merely on the prohibitory words of the statute. It was distinctly and carefully rested on the ground of the peculiarity of the subject matter, which concerned not mere ordinary civil rights, but rights and privileges always regarded as pertaining to the Legislative Assembly, in complete independence of the Crown, so far as they properly existed; and consequently it was held that, in transferring the decision of these rights from the Assembly to the Superior Court, it could not have been intended that the determination in the last resort should belong to the Queen in Council."

The next case for consideration is *Kennedy v. Purcell*, 4 T.L.R. 664, an application in 1888 for leave to appeal from a judgment of the Supreme Court of Canada in a matter arising out of a trial under the Controverted Elections Act of the Dominion.

There Lord Hobhouse, who gave the judgment, says, in reference to *Théberge v. Laudry*:

"The decision of the Judicial Committee was, not that the prerogative of the Crown was taken away by the general prohibition of appeal, but that the whole scheme of handing over to Courts of law disputes which the Legislative Assembly had previously decided for itself showed no intention of creating tribunals with the ordinary incident of an appeal to the Crown."

Then, after referring to *Valin v. Langlois*, and the argument advanced that in that case it had been held that there was power to grant an appeal, he says:

"But such variance as there was between the two

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cited causes was only to this extent—that the Committee in the latter case must have thought that the question of the existence of the prerogative was still susceptible of argument, when the dispute went to the very root of the validity of a law passed by Parliament to take effect in a Province. Their opinion on an *ex parte* hearing, and on the sole question whether or not there should be any further argument on the matter at all, could not be put higher than that.”

The cases he refers to as the “two cited causes” are *Théberge v. Laudry* and *Valin v. Langlois*, and it is *Valin v. Langlois* that he refers to as “the latter case.”

Then, again, on p. 666, after referring to the need for quickly disposing finally of such cases, he says:

“And it seemed to their Lordships that there were strong reasons why such matters should be decided within the Colony, and why the prerogative of the Crown should not, even if it legally could, be extended to matters over which it had no power, and with which it had no concern, until the Legislative bodies chose to hand over to judicial functionaries that which was formerly settled by themselves. Before advising such an exertion of the prerogative, their Lordships would require to find indications of an intention that the new proceedings should so follow the course of ordinary law as to attract the prerogative. But the indications they found were of the contrary tendency.”

In the report of the case in 59 *Law Times Reports* the word “extension” is used instead of “exertion” in the part of the judgment quoted last above.

In *Moses v. Parker*, [1896] A.C. 245, Lord Hobhouse, at p. 248, says:

“In the case of *Théberge v. Laudry* this Board had to consider the effect of a Quebec statute which transferred the decision of controverted elections to the Legislative Assembly from the Assembly itself to a Court of Justice. The statute provided that the judgment of the Court should not be susceptible of appeal. Though that provision would destroy the right of a suitor to an appeal, it did not, taken by itself, destroy the prerogative of the

Crown to allow one. But this Board held that they must have regard to the special nature of the subject; to the circumstance that election disputes were not mere ordinary civil rights; and that the statute was creating a new and unknown jurisdiction for the purpose of vesting in a particular Court the very peculiar jurisdiction which up to that time had existed in the Assembly. And they came to the conclusion that the intention of the Legislature was to create a tribunal in a manner which should make its decision final to all purposes, and should not annex to it the incident of being reviewed by the Crown under its prerogative."

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Further on he says, on page 249:

"In *Théberge v. Laudry* the Board pointed out that the case between the parties was one in which they would not think of admitting an appeal if the power existed."

In *Re Wi Matua*, [1908] A.C. at page 450, the judgment of the Judicial Committee at p. 450, in referring to *Théberge v. Laudry* and *Cushing v. Dupuy*, says:

"The difference between those cases and the present is of the broadest and most essential kind. In them the subject matter of the protected jurisdiction connoted functions conferred on the Court by statute which would not otherwise have belonged to it as the general distributor of justice. In one case—*Théberge v. Laudry*—the subject matter was actually a part of the privilege of Parliament, and therefore entirely alien to the region of prerogative."

Though I cannot see that, for the purposes of this application, it would make any difference if not enacted, it may be pointed out that section 104 of our Manitoba Act, after providing for an appeal to the Court of King's Bench *in banc*, (whose functions are now vested in this Court) from the decision of the Judges at the trial, says: "and the said judgment shall be final to all intents and purposes."

Their Lordships, I think, plainly lay down two rulings in the foregoing decisions.

Firstly—that, except possibly on the question whether

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the Act is *ultra vires* of the Legislature, the Royal prerogative to hear an appeal does not extend to cases under Controverted Elections Acts.

Secondly—that even if it did so extend they would not advise its exercise except perhaps in the case of an appeal on that question of *ultra vires*.

In the present case, the power of the Legislature, to pass the Act, has not been questioned.

In view of the way in which the matter has been dealt with in the cases above referred to, I can not doubt that this appeal would be dismissed if we were to give the leave asked for. So viewing it, I think it would be improper for us to grant leave to appeal which would compel their Lordships to again deal with matters already so fully decided by them.

I would dismiss the petition for leave to appeal.

This decision will not interfere with the petitioner's rights to apply directly to the Judicial Committee for such leave.

Costs of this petition are to be costs in the cause to the petitioner who filed the original election petition.

PERDUE, J.A. The respondent has applied for leave to appeal to the Judicial Committee of the Privy Council from two orders of this Court disposing of appeals from the Court of King's Bench. These orders were pronounced on motions made in respect of proceedings under an election petition filed in pursuance of the Manitoba Controverted Elections Act, R.S.M. 1902, c. 34. It has, I think, been conclusively settled by several decisions of the Judicial Committee itself that no appeal lies in such matters to the Privy Council. I need only refer to the following cases: *Théberge v. Laudry*, 5 A.C. 102; *Kennedy v. Purcell*, 59 L.T. 279; *Moses v. Parker*, [1896] A.C. 245; *Re Wi Matua*, [1908] A.C. 448.

These decisions show that in cases of ordinary legal

rights suitors may, as a general rule, appeal to His Majesty in Council, and, if prevented from appealing as of right, any suitor may ask for special leave to appeal by virtue of His Majesty's prerogative. But the rights involved under an election petition stand upon a different footing. Until the passing of the Controverted Elections Act, the jurisdiction of deciding election petitions and determining the status of those who claimed to be members of the Legislative Assembly, had existed in the Assembly itself. As Lord Robertson very tersely pointed out in *Re Wi Matua*, the subject matter of an election petition was in former times actually a part of the privilege of Parliament, "and therefore entirely alien to the region of prerogative."

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I think the petition for leave to appeal in each case should be dismissed.

HOWELL, C.J.M., CAMERON, J.A., and HAGGART, J.A., concurred.

*Petition dismissed.*

### COURT OF APPEAL.

#### RE COLONIAL INVESTMENT CO.

Before HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON and  
HAGGART, J.J.A.

*Winding-up of Company—Dominion Winding Up Act, R.S.C. 1906, c. 144, ss. 6, 11—Constitutional Law—Company incorporated under Provincial legislation—Ultra Vires—Bankruptcy and insolvency—Insolvency of Company, proof of—Affidavit evidence.*

1. Any scheme of bankruptcy or insolvency legislation necessarily involves the rateable distribution among his creditors of the assets of the insolvent whether he is willing that they should be so distributed or not, and the result of the decision in *Atty. Gen. for Ontario v. Atty. Gen. for Canada*, [1894] A.C. 189, is, in effect, that, when a voluntary assignment is made by a debtor for the benefit of his creditors, a Provincial Legislature has power, under its jurisdiction over Property and Civil Rights, to give the assignment precedence over judgments, attachments, &c., and to make other provisions for

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effecting the rateable distribution of the debtor's assets among his creditors, but that, wherever the element of compulsion is to be applied in dealing with an insolvent estate, the Parliament of Canada may exclusively pass the necessary legislation.

2. The words "Bankruptcy and Insolvency," in section 91 of the British North America Act, should have the widest meaning assigned to them and they should be interpreted as covering the whole field of legislation relating to the compulsory liquidation and distribution of the assets of debtors, which power necessarily carries with it the right to declare certain things to be acts of insolvency, although they were not theretofore regarded as such, and to declare what shall be evidence of insolvency or of a state of affairs which will justify the taking of proceedings under the Act.
  3. Parliament, therefore, has power to provide, as it does in the Dominion Winding Up Act, R.S.C. 1906, c. 144, ss. 6, 11, that a loan Company having borrowing powers, though incorporated under Provincial legislation, and whether or not it was insolvent in the meaning of that word as previously understood, should be deemed to be insolvent, (a) if, at a special meeting of the shareholders called for the purpose, it has passed a resolution requiring the Company to be wound up, or, (b) if the Company is in liquidation or in process of being wound up, and that, if either of these conditions exists, a winding up order may be made under the Act.
- L' Union St. Jacques v. Belisle*, (1874) L.R. 6 P.C. 31, *Cushing v. Dupuy*, (1880) 5 A.C. 409, and *Re Union Fire Ins. Co.* (1885) 10 O.R. 489; (1886) 13 A.R. 269. (1887) 14 O.R. 618. (1887) 14 S.C.R. 624; (1889) 16 A.R. 161, (1890) 17 S.C.R. 265, followed.

*Re Cramp Steel Co.*, (1908) 16 O.L.R. 230, dissented from.

4. In view of the history of bankruptcy legislation both in England and Canada, provisions in an insolvency Act, such as the Dominion Winding Up Act is, constituting the conditions above referred to to be acts of bankruptcy or insolvency, though the Company may have assets sufficient to meet its liabilities to creditors, must be considered as reasonable in themselves and as naturally incidental to an insolvency law, and not improper or unwarranted usurpations of power belonging to the Provincial Legislatures.
5. A shareholder is entitled to petition for a winding up order under the above circumstances.

*Per* HAGGART, J.A. The voluntary winding up of a company is the same in effect as an assignment from an individual to a trustee for creditors which has always been regarded by the Courts as an act of bankruptcy, even before it was so made by statute; *Halsbury*, vol. II, p. 14.

The facts proved by the affidavits filed also justified an order to wind up since they showed, independently of other matters, that it was just and equitable that the Company should be wound up (par. (e) of section 11 of the Act.)



*In re Gold Company*, (1879) 11 Ch. D., per James, L.J., at pp. 709, 710, and *In re West Surrey Tanning Co.*, (1866) L.R. 2 Eq. 737, followed.

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HOWELL, C.J.M., dissented, holding that it was *ultra vires* of the Parliament of Canada to provide for the compulsory winding up of a company incorporated by a Provincial Legislature, unless it was shown to be actually insolvent, which was not shown in this case, following *Re Cramp Steel Co.* (1908) 16 O.L.R. 230; also that affidavits on information and belief merely are not sufficient to support a petition under the Act; *Re Manitoba Commission Co.*, 22 M.R. 269.

ARGUED: 26th November, 1913.

DECIDED: 17th December, 1913.

PETITION by Joseph Marshall, a shareholder to the extent of \$1,000 in the above-named Colonial Investment Company of Winnipeg, for a winding up order under the Dominion Winding Up Act, R.S.C. 1906, c. 144, and amending Acts. Statement.

The following judgment on the hearing of the application was delivered by

GALT, J. The Company was first incorporated under the authority of the Manitoba Building Societies Act with the objects, amongst others, of borrowing money and receiving deposits and carrying on generally the business of a loan and investment company. By private Act of the Legislature of Manitoba, c. 56, 1 Ed. VII, the Company was incorporated anew and it was provided (section 2) that the Company should have, hold and continue to exercise all the rights, powers and privileges that previous to the said Act it had used, exercised and enjoyed.

The conditions and terms adopted by the Company in loaning money to borrowers were exceedingly complicated and unusual; some of such terms are set forth at length in paragraph 8 of the petition. The meaning and effect of these terms was carefully examined by Mr. Justice Beck of Alberta in the case of *The Colonial Investment Co. of Winnipeg v. Borland*, (December, 1911), 19 W.L.R. 588, when his Lordship came to the conclusion

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that such terms were too intricate and complex to be understood and enforced; that the defendant could not have understood them, and that he was entitled to relief on the ground of mistake.

It is difficult to resist the conclusion that many other mortgages of the Company, containing similar terms, may be open to the same objection and with the same result as occurred in the *Borland* case.

On June 5th, 1913, a notice to the shareholders of the Company was sent out by George Leslie, Secretary, calling an extraordinary general meeting of the Company to be held at the Company's office in Winnipeg on Friday, the 20th day of June, 1913, at 3 p.m., for the purpose of considering and, if thought fit, passing a resolution under paragraph (b) of section 4 of The Joint Stock Companies Winding Up Act, R.S.M. 1902, c. 175, with a view to voluntary winding up of the affairs of the Company, and appointing a liquidator. The shareholders were notified that, if the resolution passed by the requisite majority, the same would be submitted for confirmation to a second extraordinary general meeting to be subsequently convened. The secretary also enclosed with the notice a copy of a financial statement of the Company up to December 31, 1912, signed by A. D. Jolliffe, Auditor, setting forth the assets and liabilities of the Company, and showing a deficit of \$9,220.46.

At the meeting held pursuant to said notice, a resolution was passed that the Company be wound up. On June 24th notice of an extraordinary general meeting to be held on the 10th day of July, 1913, at 2 p.m., for the purpose of confirming the said resolution, was sent to the shareholders, and on July 10th the resolution was duly confirmed and the Canadian Guaranty Trust Co. was appointed to act as liquidator of the Company, and H. L. Adolph was appointed inspector. Since that date

the voluntary liquidation has been going on, subject to certain restrictions arranged between the parties interested when this petition was first filed.

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The petition was supported in the first instance by the affidavits of James Hooper and Joseph Marshall and, subsequently by the affidavits of Robert Macqueen and Benjamin Denby, admitted by leave of the Court. No material was read on behalf of the liquidator in the voluntary winding up, but he was represented by counsel who strenuously opposed the petitioner's application on the ground that the material read by the petitioner was insufficient to justify a compulsory order.

The petitioner relies upon sections 6 and 11 of the Dominion Winding Up Act which, so far as applicable to this petition, read as follows:

"6. This Act applies to all corporations incorporated by or under the authority of an Act of the Parliament of Canada \* \* \* and also to incorporated banks, savings banks, incorporated insurance companies, loan companies having borrowing powers, building societies having a capital stock, incorporated trading companies doing business in Canada, wheresoever incorporated, and

"(a) which are insolvent, or

"(b) which are in liquidation or in process of being wound up, and on petition by any of their shareholders or creditors, assignees or liquidators asked to be brought under the provisions of this Act."

"11. The Court may make a winding up order—

"(b) Where the Company, at a special meeting of the shareholders called for the purpose, has passed a resolution requiring the Company to be wound up;

"(c) when the Company is insolvent;

"(e) when the Court is of opinion that for any other reason it is just and equitable that the Company should be wound up."

Dealing first with section 6, counsel for the liquidator argue that there is no sufficient evidence of the Company's insolvency, and that paragraph (b) (relating to

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companies in liquidation) can only apply to companies incorporated under the Dominion Companies Act.

In support of this contention, reference was made to *Re Cramp Steel Co.*, 16 O.L.R. 230, where it was held by the late Mr. Justice Mabee that the provisions of the Dominion Winding Up Act do not apply to a company incorporated under a Provincial statute unless such company is shown to be insolvent.

In that case there were no creditors, and so insolvency could not be shown; but it was admitted that, if the Dominion Statute was applicable, the petitioners had made out a case under paragraph (d) of section 11 (when the capital stock of the company is impaired to the extent of twenty-five per centum thereof, &c.), and that also paragraph (e) (when the Court is of opinion that for any other reason it is just and equitable that the company should be wound up) might have been held to apply to the facts.

His Lordship says, at p. 231:

"Now the Steel Company in question, not being insolvent and being a corporate body brought into existence under the Ontario Companies Act, is of course subject to the Ontario Winding Up Act, but I am unable to see how it can be brought under the provisions of the Dominion Winding Up Act. If this latter Act provided that the clause in question (sec. 11) should apply to Provincial corporations, whether insolvent or not, I think it would clearly be *ultra vires*, but it does not so provide, so it is fair to presume that it was intended to apply to such companies as were subject to federal control or companies incorporated under the Dominion Companies Act. I think it is clear that the order cannot be made under section 11. It was also contended that the order might be made under sub-section (b) of section 6 (that is trading companies doing business in Canada wheresoever incorporated and which are in liquidation, etc.), as the material shows the company is in process of a voluntary liquidation or winding up. I think the same objection applies to this

section, or, in other words, the only clauses of the Dominion Act that can be made to apply to an Ontario corporation are those dealing with insolvency."

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His Lordship concludes that, as the facts show a proper case for a winding up order, and as the motion fails only upon the ground that the Dominion Act does not apply, it is dismissed without costs.

The only authorities referred to in the judgment are certain decisions *Re Union Fire Insurance Co.*, in 14 O.R. 618; 16 A.R. 161, and 17 S.C.R. 265.

The history of this litigation originated some years earlier than the first of the reported cases above mentioned, and it has an important bearing upon the question at issue.

*Re Clarke v. Union Fire Insurance Co.*, (Shoolbred's petition) 10 O.R. 489, contains a statement of the facts out of which the later decisions arose. It there appears that on or about November 24th, 1881, Alexander A. Allen, Delia Amelia Lyman and James Paterson took proceedings under the Ontario Joint Stock Companies Winding Up Act and obtained an order under the said statute from the County Court Judge in Toronto for winding up the Union Fire Insurance Co. This order was confirmed on appeal; see 7 A.R. 783. At that date an Act respecting the Winding Up of Joint Stock Companies in Ontario was in force: (41 Vic., c. 5—see also R.S.O. 1887, c. 183). This statute appears to be similar in form and substance to our present Manitoba Winding Up Act and neither of these Acts authorizes a winding up based on insolvency.

On November 29, 1881, a writ was issued in the Chancery Division of Ontario in an action by one Clarke, who sued on behalf of himself and all other creditors of the Union Fire Insurance Co., against the Company for administration of the Company's deposit in the hands of the Provincial Treasurer, and one Badanac was

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appointed *interim* receiver. On January 7, 1882, judgment was pronounced in the suit whereby, after reciting that the Company had failed to pay an undisputed claim arising, or loss insured against, in Ontario for a space of 60 days after being due, whereby the deposit of the Company with the Treasurer of Ontario had, under the provisions of the Ontario Insurance Act, become liable to administration and distribution, the Court continued W. Badanac as receiver of the Company, and there was a reference to the Master in Ordinary to take an account of the debts and liabilities of the Company and fix priorities of the creditors; further directions being reserved.

By an order made in the said action in the Chancery Division on November 29, 1882, the said Alexander A. Allen *et al.* were added as parties defendants to the said action to represent themselves and other shareholders who obtained and were prosecuting the said winding up order, and by the said order the winding up order and all the proceedings thereunder were stayed.

During the same year, 1882, the first Dominion Winding Up Act was passed, and on January 27, 1885, an order was made upon the petition of two of the creditors of the Union Fire Insurance Company, declaring that the Company was an insurance company within the meaning of 45 Vic., c. 23, and amendments thereto, and directing the winding up of the company.

It will be seen by the above statement that the Company was first placed in liquidation under the Ontario Joint Stock Companies Winding Up Act for some reason other than insolvency; that then a suit in Chancery was commenced, based upon the Company's failure to pay one creditor for sixty days, and partly carried out, and then a winding up order under the Dominion Act was granted.

Shoolbred petitioned to discharge the last mentioned

winding up order upon the ground, amongst others, that the Dominion Parliament had no jurisdiction over a company incorporated in Ontario. Mr. Justice Proudfoot, before whom the petition came in 1885, points out, in 10 O.R. 489, at p. 494, that the Insolvent Acts had been repealed by 43 Vic., c. 1 (D) on April 1, 1880, and, from that time until the passing of 45 Vic., c. 23, on May 17, 1882, there was no mode by which companies could be wound up in the technical sense of that phrase, and that during that interval Clarke instituted said action on behalf of himself and all creditors of the Company against the Company. The Dominion Winding Up order had been made without notice to the creditors, contributories, shareholders, etc., of the Company, and it did not contain the appointment of a liquidator. Shoolbred's appeal from this order is reported in 13 A.R. 268. The Court was equally divided on the questions relating to want of notice and appointment of liquidator; but, on the question of jurisdiction, it appears to have been unanimous. Patterson, J.A., at p. 286, dealing with the liquidation which had been in progress in *Clarke v. Union Fire Insurance Co.*, says:

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"Was the Company in fact in liquidation; or was its business in fact in process of being wound up? If so, the statutory declaration is that what was being done without the aid of such an Act as this may be taken up and continued under the Act. \* \* \* I have not placed any stress, in what I have said, upon the effect of the clause now in discussion in warranting the making of the winding up order, though I might well have done so, because the business of the company was in fact being wound up by order of the High Court; and moreover the order under the Ontario Joint Stock Companies Winding Up Act was in force at the specified date, namely, on 17th May, 1882."

Osler, J.A., says, at p. 288:

"I agree in the first place that this Company was, at the date of the Winding Up Act of 1882, a company

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in liquidation or in process of being wound up within the meaning of section 2 of the Act of 1884. \* \* \* The contention of the appellants requires us to introduce words not found in the section, but I see no sound reason for not giving the words which are there, and which I have already quoted, their obvious and natural meaning, namely, a company which has ceased to do business is declared or admitted to be insolvent, and the assets of which are being got in and administered for the payment of its debts. That I think was the position in which this Company was placed by their resolution passed on 24th November, 1881, and by the proceedings and judgments in Clarke's action."

Shoolbred then appealed to the Supreme Court of Canada, when the Court held that it is a substantial objection to a winding up order that such order has been made without notice to the creditors, contributories, etc., as required by section 24 of the Act then in force, and the order was therefore set aside and the petition therefor referred back to the Judge to be dealt with anew.

The petition accordingly came before Chancellor Boyd in September, 1887, when counsel for Shoolbred again raised the point that the Dominion Winding Up Act could not affect a company incorporated by the Ontario Legislature. His Lordship appears to assume that after several years of liquidation the Company was insolvent; but he says:

"I have no doubt that the Act is within the competence of the Dominion Parliament under the British North America Act, section 91, article 21, and that the present company incorporated under a Provincial charter is subject to its provisions."

The case was then appealed to the Court of Appeal for Ontario, and the question of jurisdiction was again raised.

In delivering judgment in 1889, Osler, J.A., says (in 16 A.R. at p. 165):

"I think for the reasons given in my judgment and



that of Mr. Justice Patterson on the former appeal (12 A.R. 268) that this Insurance Company, though incorporated by a Provincial statute, was subject to the Dominion Winding Up Act, 45 Vic., c. 23, and amending Acts. On that point there was no difference of opinion in this Court nor do I think it was doubted by any of us that, for the purpose of making a winding up order under sections 2 and 3 of the Act of 1884, the Company was an insolvent company and in course of liquidation by force of the proceedings in the Clarke suit within the meaning of section 2 of that Act. \* \* \* There is nothing to control the comprehensive language of section 3, which declares that the Act shall apply *inter alia* to all incorporated insurance companies doing business in Canada wherever incorporated."

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Mr. Justice Burton says, at p. 169:

"Most of the other objections are really covered by the decision in this Court and the Supreme Court; such for instance as that this was a company within the provisions of the Act and was insolvent. It was not necessary that the insolvency should be established if it was 'in liquidation' or 'in process of being wound up' within section 3; and this Court rightly or wrongly decided on the former occasion that it came within that description. If it did, then the Court could proceed to make an order that the winding up of such company should thereafter be carried on under the Act. The order is not made in that form, but is founded on the insolvency of the Company."

His Lordship then deals with a point on which he dissents from the otherwise unanimous judgment of the Court dismissing Shoolbred's appeal.

Shoolbred then appealed to the Supreme Court of Canada, see 17 S.C.R. 265, when his appeal was dismissed. Gwynne, J., says, at p. 267:

"I entertain no doubt that the Winding Up Act of the Dominion Parliament, 45 Vic., c. 23, and the Acts in amendment thereof, do apply to the Union Fire Insurance Company, and that, so applying, those Acts are *intra vires* of the Dominion Parliament, and I confess that I cannot understand how it can be doubted that this Court

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was of that opinion when it made the order which was made upon the former appeal between the same parties. It cannot be conceived that, after hearing an argument upon this very ground of appeal upon the former occasion, this Court would have remitted the case to be dealt with by the Court below, under the provisions of the statute, in accordance with the opinion of the majority of the Court as to the construction of the statute, if they were of opinion that the Act did not apply to the Union Fire Insurance Company."

Patterson, J., says, at p. 274:

"Section 3 declares that the Act applies to certain incorporated companies, including incorporated insurance companies, wheresoever incorporated, and

"(a) Which are insolvent;

"(b) Which are in liquidation or in process of being wound up, and on petition by any of their shareholders or creditors, assignees or liquidators asked to be brought under the provisions of the Act.

"No language could be more general and comprehensive or less calculated to suggest the exclusion of any class of incorporated companies, nor has any good reason been given for thinking such exclusion can have been intended \* \* \*

"In its compulsory operation upon incorporated companies the Winding Up Act is an insolvency law. Companies that are not insolvent, as well as those that are, may be brought under its operation by the effect of the second part of section 3 (now sec. 6) when they are already in liquidation or in process of being wound up. This may be on petition of creditors or assignees as well as shareholders or liquidators; but original proceedings under the Winding Up Act can be instituted only by creditors and only when the Company is insolvent."

The earlier proceedings respecting the Union Fire Insurance Company, and the reports thereon, do not appear to have been brought to the attention of the late Mr. Justice Mabee.

If the view expressed by Osler, J.A., in 13 A.R. at p. 289, be correct, namely, that a company which has ceased to do business is declared or admitted to be

insolvent, for the purposes of the Act, all difficulty vanishes.

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I think this view is really intended to be expressed by all of the above judgments affecting the Union Fire Insurance Company—at all events, if I may respectfully say so, I agree with and adopt it.

In connection with this question of what may be deemed insolvency it is pertinent to note that, under The Insolvent Act of 1875, a man might be deemed to be insolvent for the purposes of the Act in several instances in which he might have been actually solvent—for instance, under section 3, a debtor shall be deemed insolvent:

(g) if he wilfully neglects or refuses to appear on any rule or order requiring his appearance to be examined as to his debts under any statute or law in that behalf;

(h) or if he wilfully refuses or neglects to obey or comply with any such rule or order made for payment of his debts or any part of them;

(i) or if he wilfully neglects or refuses to obey or comply with an order or decree of the Court of Chancery or of any of the Judges thereof for payment of money.

I find it impossible to agree with the construction which the late Mr. Justice Mabee has placed upon the provisions of the Dominion Winding Up Act in *Re Cramp Steel Co.*, as it is in direct conflict with what appears to me to be the plain meaning of the statute and with practically all the judgments pronounced in the case of the *Union Fire Insurance Co.*

This, however, does not altogether conclude the contest in the present case. It cannot be said that a shareholder is entitled to a winding up order *ex debito justitiæ* merely because he brings himself within the terms of the Dominion Winding Up Act. Cases have arisen and may arise where a voluntary winding up is proceeding with perfect satisfaction to the majority of the

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creditors and shareholders and yet one or more of the parties interested desire a compulsory winding up. Such an application is subject to the discretion of the Court and has often been refused.

The next objection taken by the liquidator is that the petitioner has not brought himself within any of the provisions of section 11 of the Winding Up Act. Under that section the Court may make a winding up order, (b) where the Company at a special meeting of shareholders called for the purpose has passed a resolution requiring the company to be wound up. It is argued that, because the word "resolution" is not specially defined in the interpretation clause of the Act, the meaning of the word must be sought in the Provincial Winding Up Act. It looks as though Parliament was content to allow such a simple word as this to have its ordinary meaning. A reference to the Manitoba Winding Up Act shows that the Legislature took the same view for there is no definition of it there given.

I think myself that the resolution passed by the Company on the 20th day of June, 1913, and the special resolution confirming it passed by the Company on the 10th day of July, 1913, sufficiently comply with the requirements of the Manitoba Winding Up Act.

The petitioner did not strongly rely upon paragraph (c) "When the company is insolvent." I think, however, that, when the shareholders were notified to attend a meeting of the Company for the purpose of passing a resolution to wind up its affairs, and when at the same time a financial statement was handed to them showing a deficit of over \$8,000, the inference is very strong that the Company found itself practically in an insolvent position.

Finally the petitioner relies on paragraph (e):

"When the Court is of opinion that for any other

reason it is just and equitable that the company should be wound up."

Counsel for the liquidator argued that nearly all the matters applicable to this particular point were sworn to on information and belief, and contended that all such evidence was inadmissible. In support of this contention they referred to a decision of Mathers, C.J.K.B., in *Re Manitoba Commission Co.*, 22 M.R. 268, where His Lordship held that, inasmuch as a winding up order under the Dominion Winding Up Act finally determines the rights of the parties within the principle laid down in *Gilbert v. Endean*, 9 Ch.D. 259, a petition for such an order cannot be supported by statements on information and belief. In that case the affidavits of one James in support of the petition were of the vaguest nature, one of them stating that:

"Such statements in the said petition as relate to my own acts and deeds are true, that such statements in the said petition as relate to the acts and deeds of the said petitioners or to the said Company and such of the said statements as relate to the acts and deeds of any other person are true to the best of my knowledge, information and belief."

His Lordship points out that there were no "acts and deeds" of James set out in the petition and the statement verifying his acts and deeds in the affidavit is absolutely meaningless. The only other evidence was an affidavit of one Bissaillon. "He cannot speak of what occurred at any meeting because he was not present at any meeting and does not pretend to state what took place thereat."

Under the English practice, as his Lordship points out, affidavits on information and belief are admissible. The English practice is followed in Ontario: See form of affidavit in *Holmsted & Langton*. Also in British Columbia: See form appended to the Supreme Court Rules of British Columbia. It would appear that in Manitoba it is otherwise. I think this is to be regretted,

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for in many cases a petitioner cannot get direct evidence without going into the enemy's camp.

But the affidavits in support of the present petition contain much that is not expressed to be on information and belief, and establish at least *prima facie* evidence of facts which, in the absence of any contradiction whatever, ought to be accepted as proved. For instance, James Hooper states:

1. That he is a shareholder of the above named Company (The Colonial Investment Co., of Winnipeg) and holds shares in the capital stock thereof to the amount of \$400.

2. That on the 20th day of June, 1913, he attended a special meeting of shareholders of the Company called for that purpose and at such meeting a resolution was passed that the Company be wound up.

3. He has carefully read over the petition and says the allegations contained in paragraphs 2, 3, 4, 5, 6, 7, 8, 10, 11, 21, 22, 23, 27, 28, 29, 30, 32, 34, 36, 37 and 38 are true.

Paragraph 8 of the petition says that:

"From the time of its incorporation the Company solicited loans from and advanced money to borrowers upon mortgages containing the following among other conditions and terms"

(and then sets out the extraordinary terms referred to and dealt with by Mr. Justice Beck in the case of *Colonial Investment Co. v. Borland*, above mentioned).

Par. 10. "From the time of its organization under the Building Societies Act until the 20th day of June, 1913, one William Smith was one of the directors and at times President and always Manager of the Company."

11. "The said William Smith and two other persons were the promoters of, and until the 10th day of February, 1909, were the directors and officers of the said Company."

21. "Almost every applicant for stock in the Company was required in his application therefor to appoint the said William Smith, Manager of the Company, as his proxy to vote at all meetings of the Company, and

by the use of said proxies the said William Smith was able to, and did, control the Company and nominated the directors."

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22. "Some time after the Company was organized, applications were accepted from the promoters of the Company and others for the issue to each of them of \$2,500 worth of instalment stock of the Company, and, subsequently, when the sum of \$170 or thereabouts had been paid thereon by each of the applicants, the said stock of said applicants was declared fully paid up, and no more instalments were paid by the holders thereof, but said stock was treated as if the Company had received all the instalments thereon and dividends were paid thereon as if it were fully paid up stock."

27. "At the meeting held pursuant to said notice mentioned in the last preceding paragraph hereof, a resolution was passed that the Company be wound up, and a further resolution was passed that the President, the said H. L. Adolph, and the Company's solicitor, one Mr. Johnson, interview various trust companies with a view to obtaining some trust company to act as liquidator."

28. "That pursuant to the notice to shareholders of the Company dated the 24th day of June, 1913, an extraordinary general meeting of the shareholders of the Company was held at the Company's offices, 622 McIntyre Block, in the City of Winnipeg, on Thursday, the 10th day of July, 1913, at the hour of 2.00 o'clock in the afternoon, and that at such meeting a resolution was passed confirming the resolution mentioned in paragraph 27 hereof, and a further resolution was passed appointing the Canadian Guaranty Trust Co. to act as liquidator of the Company and the said H. L. Adolph was at said meeting appointed inspector."

30. "Your petitioner charges, as the fact is, that the said H. L. Adolph holds stock in the Company which has not been fully paid for."

38. "It is necessary for the protection of the property of the Company and for the interests of the shareholders, creditors or contributories thereof that a provisional liquidator be appointed who is in no way connected with the Company or the present or past directors thereof, and

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your petitioner humbly suggests that the National Trust Company be appointed provisional liquidator."

Hooper also states in his affidavit, paragraph 6:

"That I have carefully read paragraph 24 of the petition now shown to me, marked with the letter "C," and I say, with reference to the allegations in the said paragraph contained, that the stock in the Company to the value of \$5,000 was about the time mentioned in said paragraph issued to the said William Smith ostensibly for his services as promoter and organizer of the Company, but in reality the said William Smith gave no consideration for the said shares and has received dividends thereon from the Company."

11. "Since the year 1909 or thereabouts the Company has been loaning little, if any, money upon mortgages as hereinbefore set forth, a large amount of the money advanced by the Company being in connection with speculations of the Manager, William Smith, and his associates."

13. "That since the year 1908 the Company has practically ceased to do business as a loaning company, very few, if any, loans having been made."

18. "That the said H. L. Adolph is the holder of stock in the Company which is not fully paid up and that the said William Smith is or was the holder of stock in the Company which is not paid up and that the said William Smith and H. L. Adolph have been most active in endeavoring to have the Canadian Guaranty Trust Co. appointed liquidator of the Company and the Company wound up voluntarily under the Manitoba Winding Up Act, R.S.M., c. 175, and amending Acts."

Two additional affidavits by Robert Macqueen and Benjamin Denby were also admitted pursuant to leave which had originally been granted by the Chief Justice; but I find that these affidavits are based almost wholly upon information and belief, and therefore are inadmissible.

With regard to the various paragraphs of the petition verified by James Hooper's affidavit, stating that the allegations contained therein are true, I think that such a mode of verification ought not to be encouraged under



our present practice, as it bears a close resemblance to an affidavit on information and belief. But, in the absence of any conflicting material, such a form of verification is admissible, and many other important facts appear in other portions of the same affidavit, not open to any objection whatever.

Considering the position of William Smith, promoter and manager of the Company, and of H. L. Adolph, inspector, and of the Canadian Guaranty Trust Co., the present liquidator, I think the petitioner and any other members who are in favor of his petition have ample reason for fearing that the interests of the Company at large and of the shareholders in particular are likely to be insufficiently protected under the voluntary winding up proceedings. I am satisfied that it is just and equitable to grant a compulsory winding up order under the Dominion statute.

The name of the National Trust Company is suggested by the petitioner as a fit and proper company to be appointed provisional liquidator and no objection has been offered to this suggestion.

The order applied for is accordingly granted, declaring the Company to be insolvent and liable to be wound up under the Dominion statute. It will also contain a provision appointing the National Trust Company provisional liquidator and directing the Canadian Guaranty Trust Company to transfer the Company's assets to such provisional liquidator. The petitioner will then be in a position to apply, upon notice to the creditors, contributories, etc., for an order appointing a permanent liquidator.

The petitioner is entitled to his costs out of the assets of the Company.

The Canadian Guaranty Trust Company appealed.

*C. P. Wilson, K.C.*, and *H. A. Bergman* for appellants,  
The Canadian Guaranty Trust Co., cited *Re Cramp Steel*

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Argument. Co., 16 O.L.R. 230; *Re Union Fire Ins. Co.*, 10 O.R. 489; *Re Outlook Hotel Co.*, 12 W.L.R. 181; *Re Manitoba Commission Co.*, 22 M.R. 268; *Re United Canneries*, 9 B.C.R. 528; *Re Joint Stock Coal Co.*, L.R. 8 Eq. 146; *Shoolbred v. Clarke*, 17 S.C.R. 274; *Re Great Prairie Investment Co.*, 17 M.R. 555; *Re Harris Maxwell & Co.*, 1 O.W.N. 984; *Re Gold Co.*, 11 Ch. D. 701; *Allen v. Hanson*, 18 S.C.R. 667; *Gilbert v. Endean*, 9 Ch. D. 259, and *Re Lake Winnipeg Transportation Co.*, 7 M.R. 255.

M. G. Macneil and W. L. McLaws for petitioner, respondent, cited *Re Gold Hill Mines*, 23 Ch. D. 214; *Re Union Fire Ins. Co.*, 13 A.R. 268, 14 S.C.R. 624, 14 O.R. 618, 16 A.R. 165, 17 S.C.R. 265; *Edgar v. Central Bank*, 15 A.R. 193; *Tennant v. Union Bank*, [1894] A.C. 31; *Atty. Gen. of Ontario v. Atty. Gen. for Dominion*, [1894] A.C. 189; *Pure Spirit Co. v. Fowler*, 25 Q.B.D. 235; *Northampton Coal Co. v. Midland Waggon Co.*, 7 Ch. D. 500; *Rouch v. G.W.R.*, 1 Q.B. 51; *Bernasconi v. Farebrother*, 10 B. & C. 549; *Gimmingham v. Laing*, 2 Marsh. 236; *Cumming v. Baily*, 6 Bing. 363; *Lloyd v. Heathcote*, 5 Moo. 129; *Smith v. Moon*, 1 M. & M. 458; *Colonial Investment Co. v. Borland*, 19 W.L.R. 588, and *Cushing v. Dupuy*, 5 A.C. 409.

HOWELL, C.J.M. As I dissent from the conclusion arrived at by my brother Judges, I shall very briefly state the reasons.

By section 13 of chapter 144 of the Revised Statutes of Canada, 1906, (which I shall hereafter refer to as the Winding Up Act), the application is to be made by petition to the Court and, if the practice of the Court is not changed or regulated by that Act, I assume that the ordinary practice of the Court must be followed.

The Manitoba rule 473 provides that a petition may be proved by affidavit and by rule 514 the affidavit must be

filed before the service of the petition. Rule 507 is as follows:

"507. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted."

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Section 134 of the Winding Up Act permits rules to be made and under this section the Judges of this Province made a rule numbered 64, with the heading "Forms" as follows:

"FORMS."

"64. Until other forms are directed by further rules, the forms set forth in the third schedule to the General Orders and Rules of the High Court of Chancery in England, under the Companies Act of 1862, issued on the 11th day of November, 1862, with such variations as may be necessary to adapt them to the practice under these orders and the said Canadian Act, and as the circumstances of each case may require, may be used for the respective purposes mentioned in said schedule."

The forms therein referred to are made pursuant to several English rules, and one of the forms, headed "No. 2. Affidavit verifying petition, (Rule 4)," is as follows: "In Chancery.

"In the matter, &c.

"I, A.B., of, &c., make oath and say, that such of the statements in the petition now produced and shown to me, and marked with the letter A, as relate to my own acts and deeds, are true, and such of the said statements as relate to the acts and deeds of any other person or persons, I believe to be true. Sworn, &c."

English rule 4 provides that an affidavit made by the petitioner in that form "shall be sufficient *prima facie* evidence of the statements in the petition", and, further, that the affidavit "shall be sworn after and filed within four days after the petition is presented." This rule has not been incorporated in the Manitoba Rules. The form, it will be observed, does not in any way indicate who is to make the affidavit.

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Paragraph 35 of the petition is as follows:

"The Company is heavily indebted to various creditors. \* \* it is insolvent and utterly unable to pay its debts and liabilities." The only proof of this paragraph is an affidavit of the petitioner in the terms of the form above set out, stating that his own acts and deeds are true "and such of the said statements as relate to the acts and deeds of any other person or persons I believe to be true." This motion is not interlocutory, but final, and the affidavit is not sufficient if rule 507 applies.

Briefly let me state my views. The old English Rule 4, now Rule 29, so inconsistent with our rules above referred to, is not in force here, and the form introduced here without the rule is meaningless. I think the affidavit above referred to does not prove paragraph 35 of the petition. The particularity for proof of the insolvency and of the petition is shown in *Re Outlook*, 12 W.L.R. 181; *Re Qu'Appelle*, 5 M.R. 160; *Re Lake Winnipeg*, 7 M.R. 255, and *Re Manitoba Commission Co.*, 22 M.R. 269.

There was produced, and I think proved, a statement of liabilities and assets of the Company, which showed that the capital stock of \$205,000 was depleted to the extent of about \$9,000. The statement showed over \$11,000 of cash on hand, and apparently no pressing or immediately maturing liability. The assets were chiefly money and mortgages, amounting to over \$223,000, and the liabilities, to the extent of over \$205,000, were for stock, and even if, as urged, \$131,300 of the mortgages must be applied to wipe out a like amount of stock, still the company cannot be called insolvent, unless such small impairment of capital will place it in that rank.

There were no facts shown to prove the Company insolvent within section 3 of the Winding Up Act, nor within sub-section (a) of section 6.

Counsel for the appellant stated that he appeared for

the liquidator, and in other respects it clearly appears that the Company is being wound up and comes within sub-section (b) of section 6, and sub-section (b) of section 11.

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Very serious charges were made against officers of the Company and their close connection with the liquidators was also alleged and shown and no attempt was made to answer any of these charges, and it seems to me expedient and just and equitable that the Company should be wound up under some other hands than the liquidator company, and I think it comes under sub-section (e) of section 11. I mean by the last statements that the Company comes within those sub-sections in their bald statements, and is bound by them, if Parliament intended these sub-sections to apply to a purely local company incorporated in and doing business in Manitoba, which is not shown to be insolvent as defined by section 3.

The Manitoba Winding Up Act, R.S.M., 1902, c. 175, is, it seems to me, clearly within the powers of the Province, and the Parliament of Canada had no power to legislate to prevent its operation, unless by the powers given by section 91, s.s. 21, of the British North America Act—"Bankruptcy and Insolvency." If the argument of the respondent is sound, then the moment there is a liquidator appointed, or, even before that, when, at a special meeting of the company, there is a resolution passed to wind up under the local Act, forthwith the matter is within the Canadian Act. If this is the law, then, if the company does not owe a dollar and wishes merely to divide its assets or, without indebtedness, the time of the company's existence has expired, still it is subject to the Dominion legislation. It is difficult to hold that both statutes are *intra vires* if the wide meaning claimed is given to the Canadian Act.

The meaning of the words, "Bankruptcy and Insolvency," used in the British North America Act, has

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been to a limited extent pronounced upon in *Attorney General v. Attorney General*, [1894] A.C. 189, and in the several cases therein referred to; but much was said as to what acts or conditions were evidence sufficient under Canadian and English statutes to make parties subject to bankruptcy or insolvency statutes.

In no provision of the Canadian insolvency laws was it declared that the mere winding up and a division of the assets of a company or partnership was evidence of, or an act of, insolvency.

Section 3 gives a meaning to the word "Insolvency" and it is in harmony with the insolvency laws of Canada previously in force and in harmony also with the provisions of the English Bankruptcy laws, and I assume that Parliament had in view the provisions of the British North America Act when section 3 was enacted.

I think the true meaning to be given to the Winding Up Act is that, as to all companies insolvent within section 3, it is really an Insolvency Act. And it is merely a Winding Up Act applicable only to companies subject to Dominion legislation where such insolvency is not shown. By so holding I can give some effect and force to the Manitoba Winding Up Act and hold that both Acts are *intra vires*. I have carefully considered the case of *Re Clarke*, beginning with 10 O.R. 489, and ending with 17 S.C.R. 265, in all its phases, and the many wide remarks of the various Judges made therein. It seems clear that the case was one of a company clearly insolvent and that the general remarks are to be limited to such a company.

To me the decision in *Re Cramp*, 16 O.L.R. 230, is sound law.

It is to be observed that *Attorney General v. Attorney General*, [1894] A.C. 189, was decided in a case where the field of legislation was only occupied by the Provincial statute. Here Canada has legislated as to insol-

vent companies, as it lawfully may, and the remarks as to the restricted powers of the Province in such a case, on page 201, I have not overlooked. Both legislative powers cannot have statutes on the same subject in force at the same time. It must be that the Province has power to pass laws respecting the winding up of companies properly incorporated by its laws, so long as the company is not insolvent and within the reach of the legislative power of the Dominion.

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I think chapter 175 of R.S.M., 1902, is *intra vires* and applies to all local companies not shown to be insolvent within section 3 of the Canadian Winding Up Act.

I would allow the appeal and dismiss the petition with costs.

PERDUE, J.A. This is an appeal from Galt, J., who granted a winding up order under the Winding Up Act, R.S.C. 1906, c. 144, upon the petition of a shareholder of the company. The facts in the case are fully dealt with in his judgment. The questions raised on this appeal were: Can an application be made by a shareholder in a company incorporated under a Provincial statute to wind up the company under the Dominion Winding Up Act? Can any one, except on the ground of insolvency, invoke the Dominion Winding Up Act to wind up a local company?

By number 21 of section 91 of the British North America Act, the exclusive power to legislate in respect of bankruptcy and insolvency is assigned to the Parliament of Canada. The terms "Bankruptcy" and "Insolvency" appear to be synonymous, the latter term being the one in use in Canada at the time of Confederation and having a meaning similar to that of "Bankruptcy" as used in Imperial statutes: *Atty. Gen. for Ontario v. Atty. Gen. for Canada*, [1894] A.C. 189. The case just cited dealt with the validity of the Ontario

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Assignments Act. The Privy Council, in giving judgment, declined to define the meaning of "Bankruptcy and Insolvency" as used in section 91 of the British North America Act, but pointed out:

"That it is a feature common to all the systems of bankruptcy and insolvency, to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative."

It was further shown that any scheme of bankruptcy or insolvency legislation necessarily involves compulsion. The result of the decision was, in effect, that, when a voluntary assignment is made by a debtor for the benefit of his creditors, a Provincial Legislature has power, under its jurisdiction over Property and Civil rights, to give that assignment precedence over judgments, attachments, &c., and to make other provisions for effecting the rateable distribution of the debtor's assets amongst his creditors; but, wherever the element of compulsion is to be applied in dealing with an insolvent estate, Parliament may pass the necessary legislation and it is the only legislative authority in Canada which can do so.

All legislation by the Dominion dealing with that question is necessarily an interference with property and civil rights, and it would be very difficult to define exactly what is meant by the words "Bankruptcy and Insolvency," as used in the British North America Act, and to say what limit is to be placed on the powers of Parliament in legislating upon this subject.

If we take the analogous provision in section 91 which places the criminal law within the exclusive jurisdiction of the Parliament of Canada, we find that the expression "Criminal law" must be interpreted in its widest sense:



*Atty. Gen. of Ontario v. Hamilton Street Ry. Co.*, [1903] A.C. 524. The power of Parliament in respect of that subject is not limited to the meaning placed upon the expression "Criminal law" at the time of Confederation. Parliament may prohibit and punish as a crime an act which, apart from the statute, was in no way criminal in its nature: *Rex v. Lee*, 23 O.L.R. 490.

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Upon the analogy of the above, we should assign to the expression "Bankruptcy and Insolvency" the widest meaning and interpret the expression as covering and including the whole field of legislation relating to the compulsory liquidation and distribution of the assets of debtors. This power necessarily carries with it the right to declare what facts or circumstances shall constitute a condition of insolvency so that the provisions of a statute dealing with the subject may be put in motion.

The Winding Up Act, R.S.C. 1906, c. 144, is an Act relating to Bankruptcy and Insolvency. It deals with companies and not with individuals. The liabilities of incorporated companies are two-fold. There is the liability to the ordinary creditors of the company and there is the liability to the shareholders who contributed the capital. In the balance sheets exhibited by companies showing the result of their operations, these two forms of liability are almost always shown and, when shown, are usually distinguished as liability to the general public and liability to the shareholders. By section 11, subsection (d), of the Winding Up Act, permanent impairment of capital to the extent of twenty-five per cent is a ground for making a winding up order. This indicates that the inability of the company to show assets to the value of the capital contributed by the shareholders may, in certain cases, be regarded as a form of insolvency.

Where a company incorporated under Provincial authority has been carrying on its operations at a loss, and the capital contributed by the shareholders has been

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impaired and is likely to suffer further impairment. either the Parliament of Canada or the Legislature of the Province must possess the power of authorizing a compulsory winding up at the instance of a shareholder. Even if the Legislature has provided means by which a voluntary winding up may be effected, it may prove to be necessary or expedient that the winding up should be made compulsory, and the liquidation of the company's assets placed in hands other than those selected by shareholders who control a majority of the shares. It may happen in such a case that the influence of the majority is inimical to the minority of the shareholders. It may happen that the affairs of the company require the application of the more stringent proceedings applicable in a case of insolvency, although it is solvent in so far as its liabilities to the public are concerned. If compulsion is to be introduced in respect of the winding up, it can only be done by the authority of the Parliament of Canada.

Section 6 enumerates the classes of companies to which the Act applies. One of these classes is loan companies having borrowing powers and this class would include the present company. But in all cases, to make the Act apply, it must appear that the company is either (a) insolvent, or (b) that it is in liquidation or in process of being wound up, in which case shareholders, creditors, assignees or liquidators may apply. To ascertain when a company is deemed to be insolvent we must look to section 3. The portion of that section bearing on the present case is as follows:

"A company is deemed insolvent, \* \* \* (c) if it exhibits a statement showing its inability to meet its liabilities; \* \* \* (g) if it has made any general conveyance or assignment of its property for the benefit of its creditors."

Again, section 11 empowers the Court to make a winding up order,

“(b) where the company at a special meeting of shareholders called for the purpose has passed a resolution requiring the company to be wound up; (c) where the company is insolvent; (e) when the Court is of opinion that for any other reason it is just and equitable that the company should be wound up.”

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From the above sections it appears that the Act applies to a company that is insolvent in the ordinary sense or that is in liquidation, the latter condition being regarded as a species of insolvency. The Act is intended not only as a protection to creditors of the company, when the latter is financially embarrassed, but also as a protection to shareholders in certain cases, although the company is solvent as regards its ordinary debts. I think the Parliament of Canada has power to declare certain things to be acts of insolvency, although they were theretofore not regarded as such, and also to declare what shall be evidence of insolvency or of a state of affairs which will justify the taking of proceedings under the Act and the granting of a winding up order.

The proof of the allegations in the petition in the present case was in many respects incomplete and unsatisfactory. It is, however, established that the company is in liquidation and in process of being wound up, and that the company, at a special meeting called for the purpose, passed a resolution requiring it to be wound up. A financial statement of the company, dated 31st December, 1912, was put in evidence which showed that its liabilities, including those to its own shareholders, exceeded its assets by \$9,220.46. There is good reason to believe that this deficit will be greatly increased on liquidation. For instance, one item that figures amongst its assets is a *deficit of the treasurer* for \$5,500. It also appears that the liquidation now in progress will be controlled or directed by persons who may prove to be debtors or contributories of the company. In these cir-

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cumstances, I quite agree with Galt, J., that this is a proper case in which to make a winding up order.

The main objection on the part of the respondent was that the Winding Up Act passed by the Dominion Parliament was not intended to deal with companies incorporated under Provincial Acts, except in cases of actual insolvency, and that insolvency, in so far as creditors' claims are concerned, was not proved in the present case. In support of this contention reliance was placed upon the judgment of Mabee, J., in *Re Cramp Steel Co.*, 16 O.L.R. 230. With great respect for the opinion of that learned Judge, I cannot agree with the broad conclusion at which he arrived—that the provisions of the Act do not apply to a company incorporated under a Provincial Act unless the company is insolvent, that is, insolvent in respect of its ordinary debts. Galt, J., in his decision in the present case fully discusses the authority cited by Mabee, J., in the *Cramp Steel Co.* case, namely, *Re Union Fire Ins. Co.*, 14 O.R. 618, 16 A.R. 161, 17 S.C.R. 265. I would quote the language used by Patterson, J., in giving judgment in that case in the Supreme Court of Canada:

"In its compulsory operation upon incorporated companies the Winding Up Act is an insolvency law. Companies that are not insolvent, as well as those that are, may be brought under its operation by the effect of the second part of section 3 (present section 6) when they are already in liquidation or in process of being wound up. This may be on petition of creditors or assignees as well as of shareholders or liquidators; but original proceedings under the Winding Up Act can be instituted only by creditors and only when the company is insolvent." *Schoolbred v. Clarke, Re Union Insurance Co.*, 17 S.C.R. 265, 274.

In the same case Gwynne, J., said that he had no doubt that the Winding Up Act applied to the Union Insurance Co., a company incorporated by the Legislature of Ontario, and that, so applying, the Act

and amending Acts were *intra vires* of the Dominion Parliament. None of the other judges gave written reasons for their decision, but all were unanimous in arriving at the same conclusion. Reference might also be made to the judgment of the Court of Appeal in the same case, reported in 16 A.R., page 161, and particularly to the judgment of Osler, J.A., at page 165, part of which is cited in the judgment of Galt, J. It appears to me that the opinions of these eminent judges strongly support the view that the Act is constitutional.

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The application for the winding up order in the present case is made by a shareholder holding shares in the capital stock of the Company to the amount of \$1,000. This gives the petitioner the necessary status to make the application under (b), (c) and (e) of section 11.

I think the appeal should be dismissed with costs.

CAMERON, J.A. Assuming that the insolvency of this company has not been effectively shown to come within sub-section (a) of section 6, or under sub-section (c) of section 3 of the Act, it can, in my opinion, be taken as established, (1) that the company was in liquidation, or in process of being wound up, under sub-section (b) of section 6, in which case the proceedings may be taken by a shareholder, as in this case; also (2) that the company at a special meeting of shareholders called for that purpose passed a resolution requiring the company to be wound up, in which event also the proceedings may be taken by a shareholder (section 12).

This company has borrowing powers within the meaning of section 6, and, as it was incorporated by Provincial statute, the question arises whether, its insolvency not being shown, it is subject to the Winding Up Act, (R.S.C., 1906, c. 144); or, to put it in another way, the question arises whether the Winding Up Act, in so far as it assumes or may be taken to assume to cover Pro-

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vincial companies (not insolvent), is or is not *ultra vires* of the Dominion Parliament.

What is the meaning of the term "Bankruptcy and Insolvency" in sub-section 21 of section 91 of the British North America Act?

"It is not necessary, in their Lordships' opinion, nor would it be expedient, to attempt to define what is covered by the words 'bankruptcy' and 'insolvency' in section 91 of the B. N. A. Act": *Attorney General of Ontario v. Attorney General of Canada*, [1894] A.C. 189, per Lord Herschell, at p. 200.

I think, however, we can look at the general jurisprudence of England and Canada to ascertain the features common to systems of bankruptcy and insolvency in those countries in order to ascertain what may be provisions of an insolvency law necessarily or reasonably or properly incidental to such systems. The Parliament of Canada has power

"To deal with matters local or private in cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of section 91":

*Attorney General for Ontario v. Attorney General for Dominion*, [1896] A.C. 348, at p. 360, and it might pass legislation "upon matters which are *prima facie* committed exclusively to the Provincial Legislatures": p. 359.

A wide discretion must be allowed the Federal Parliament in legislating upon all matters assigned to it by the B. N. A. Act, but the Courts will restrain and prevent colorable encroachments on the local jurisdiction. See *Tennant v. Union Bank*, [1894] A.C. 31, where it was held that the jurisdiction of the Federal Parliament over Banks and Banking extended over every transaction within the legitimate business of a banker, notwithstanding

ing its interference with Property and Civil rights in the Province.

In *L'Union St. Jacques v. Belisle*, (1884) L.R. 6 P.O. 31, Lord Selborne says, at p. 36, that the words bankruptcy and insolvency are well known legal terms expressing systems of legislation familiar to England and other countries.

"The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including, of course, the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation."

And, if a general law had been passed to the effect that a corporation, placing itself in the position that *L'Union St. Jacques* had placed itself, should come within it, then his Lordship declared that he was not prepared to say such legislation would not be competent. In point of fact the Provincial legislation there in question was of a moderate character providing rather for delay in administration than for compulsory winding up.

In *Cushing v. Dupuy*, 5 A.C. 409, (expressly affirmed in *Tennant v. Union Bank*, [1894] A.C. 31), certain provisions of the Insolvency Act then in force were attacked as *ultra vires* and it was held by the Judicial Committee that:

"It was contended for the appellant that the provisions of the Insolvency Act interfered with property and civil rights, and were therefore *ultra vires*. This objection was very faintly urged, but it was strongly contended that the Parliament of Canada could not take away the right of appeal to the Queen from final judgments of the Court of Queen's Bench, which, it was said, was part of the procedure in civil matters exclusively assigned to the Legislature of the Province. The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administra-

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tion of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some special mode of procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion parliament the subjects of Bankruptcy and Insolvency, intended to confer on it legislative power to interfere with Property, Civil rights and Procedure within the Provinces, so far as a general law relating to those subjects might affect them."

In *Attorney General v. Attorney General*, [1894] A.C. 189, where the validity of the Ontario Voluntary Assignments Act was impeached, the observations made by Lord Herschell at pp. 196 to 200 appear to me most material to the subject now before us.

In *Re Cramp Steel Co.*, 16 O.L.R. 230, the late Mr. Justice Mabee held that the company there in question, not being insolvent and being a corporate body brought into existence under the Ontario Companies Act, could not be brought under the provisions of the Dominion Winding Up Act.

"If this latter Act provided that the clause in question (that relating to the impairment of capital, sub-section (d) of section 11) should apply to Provincial corporations, whether insolvent or not, I think it would clearly be *ultra vires*."

The judgments in the case of *Clark v. Union Fire Insurance Co.* are to be found in 10 O.R. 489; 13 A.R. 269; 14 S.C.R. 624; 14 O.R. 618; 16 A.R. 161, and 17 S.C.R. 265. These are reviewed by Mr. Justice Galt in his judgment and he refers to expressions in some of the judgments, upon which he bases his decision, at variance with that of Mr. Justice Mabee above quoted.

In the Insolvent Act of 1864, 27-28 Vic., c. 17, s. 3, there are to be found various provisions determining in



what events a debtor shall be deemed insolvent, one of which is, if he has made any general conveyance or assignment of his property for the benefit of his creditors. The provisions of the above section are substantially repeated in the Act of 1869, 32-33 Vic., c. 16, s. 13, and in the later Act of 1875, 38 Vic., c. 16, s. 3, mentioned by Mr. Justice Galt.

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In the English Act, 24-25 Vic., c. 134, a declaration in writing by the debtor that he is unable to pay his debts is constituted an act of bankruptcy, as is also the filing of a petition by him, and a deed of assignment complying with certain requisites and registered is made subject to the jurisdiction of the Court of Bankruptcy, ss. 192-197.

Under the English Act, 32-33 Vic., c. 71, (1869) by section 6, sub-section (1), it is declared an act of bankruptcy if the debtor has made a conveyance or assignment for the benefit of creditors. This has always been held to be an act of bankruptcy and this express enactment in no way altered the previous law. *Re Wood*, L.R. 6 Ch. 306.

Under the English Companies Act, 1862, (25 & 26 Vic., c. 89, s. 78) a company may be wound up whenever it, (1) has passed a special resolution for that purpose, (2) does not commence business within a year, or suspends business for a year, (3) its members are reduced to less than seven, (4) it is unable to pay its debts, or (5) whenever the Court deems it just and equitable to wind it up. Sec. 80 defines when a company is unable to pay its debts. It is to be observed that provisions (1), (2), (3) and (5) are not necessarily incidental to insolvency or inability to pay debts, as indicated by sec. 80. By section 164 any conveyance or assignment made by any company for the benefit of its creditors is void to all intents.

Our Dominion Winding Up Act is, of course, an

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Insolvency or Bankruptcy Act. The words, "in liquidation or in process of being wound up", do not necessarily mean under a statutory proceeding or by a Court order. I think the reasoning of Patterson, J., in *Re Union Fire Ins. Co.*, 13 A.R. at p. 286, bears out this construction. An assignment for the benefit of creditors might, therefore, be fairly held to come within this sub-section (b) of section 6 of the Act.

But an assignment for the benefit of creditors made by an individual or partnership has always been considered an act of bankruptcy, and its operation was precisely the same "whether the assignor was or was not in fact insolvent." *Attorney General v. Attorney General*, [1894] A.C. per Lord Herschell at p. 199. With us a Provincial company can make such an assignment. Whether, however, it be or be not an act of bankruptcy or insolvency, it could, in my opinion, be constituted such by appropriate Dominion legislation, and the question whether the company was insolvent or not would then be immaterial. It would seem to me, therefore, that, the jurisdiction of the Dominion Parliament over Provincial corporations being established beyond doubt to that extent, it follows that the same jurisdiction must be conceded when the Provincial corporation is in liquidation or in process of being wound up, or when the company, at a special meeting of shareholders called for the purpose, has passed a resolution requiring the company to be wound up, and such jurisdiction exists whether the company "was or was not in fact insolvent." These two sub-sections, (b) of section 6 and (b) of section 11, seem to me to be properly incidental and ancillary to an insolvency law relating to corporations, though, from one aspect, they do trench upon the subject of "Property and Civil rights" reserved for the Local Legislature. But the intention on the part of the Imperial Statute to confer on the Dominion Parliament

power to interfere with Property, Civil rights and Procedure within the provinces, so far as a general law relating to the subject of Bankruptcy and Insolvency might affect them, cannot now be questioned: *Cushing v. Dupuy*, 5 A.C. 409.

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If these or similar provisions were made applicable to associations of persons, not incorporated, as parts of a Federal insolvency law, it would, in my opinion, be difficult to argue that those persons, so associated, were not within the law simply because they were not actually insolvent. And the fact that those persons should become corporations under a Provincial Act, does not seem to me to vary or affect the law by excluding such corporations, if not actually insolvent, from its operation, provided that they come otherwise within its provisions. In view of the history of bankruptcy legislation, such provisions must be considered, in themselves, as reasonable and as naturally incidental to an insolvency law. They are not improper or unwarranted usurpations of power belonging to another jurisdiction and, in a case where the Dominion and Provincial jurisdictions are concurrent, that of the Dominion must be held paramount.

Our Manitoba Winding Up Act provides for a winding up, on a resolution of the company, (R.S.M. 1902, c. 175, s. 4) which is voluntary, except where a contributory makes an application to the Court (sec. 5), and, even then, the proceedings might be of a voluntary character. A resolution thus passed is, in itself and its consequences, strongly analogous to a voluntary assignment. The consequences of commencement to wind up are set out in section 8. The Court may make orders staying actions against the company, except by leave, section 23, and may settle a list of contributories and otherwise deal with, administer and distribute the property of the company. When the winding up order

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is made the company is certainly in liquidation and in process of being wound up.

I would say that sub-section (b) of section 6 of the Dominion Act can be taken to mean that Parliament thereby declares that a company is insolvent for the purposes of the Act if it be in liquidation, or in process of being wound up, and that sub-section (b) of section 11 is to the same effect, and that, in either case, the question of actual insolvency is immaterial. The history of bankruptcy legislation goes to show that provisions such as these have been treated as proper and necessary, as effectively declaring what are to be considered as acts of bankruptcy sufficient to justify the adjudication of bankruptcy to be made on which the Court proceedings must be founded. They appear to me legitimate and proper provisions, when found in an Act relating to bankruptcy and insolvency, and not mere colorable encroachments on the powers expressly reserved to the Provincial jurisdiction.

In my opinion, therefore, as the Company comes within sub-sections (b) of sections 6 and 11 of the Act, those sub-sections apply to it and it is not necessary to show its insolvency.

I think the appeal must be dismissed.

HAGGART, J.A. I accept the full and careful statement of facts set forth in the reasons of Mr. Justice Galt, which relate to the questions and issues in this matter. I agree with him as to the order he made on the hearing of the petition of Marshall, a shareholder of the Company.

Counsel for the appellants relied upon the judgment of Mr. Justice Mabee in *Re Cramp Steel Co.*, 16 O.L.R. 230, who held that the provisions of the Dominion Winding Up Act do not apply to a company incorporated under the Ontario Act unless such company is shown to be insolvent, and further that, if the statute provided

that it should apply to Provincial corporations whether insolvent or not, it would clearly be *ultra vires*, and that learned Judge relied upon *Re Union Fire Ins. Co.*, (1887) 14 O.R. 618; (1889) 16 A.R. 161, (1890) 17 S.C.R. 265.

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With all due respect, I do not think *Re Union Fire Ins. Co.* supports Judge Mabee's *dicta*, and I agree with the view of Mr. Justice Galt, who is inclined to consider it an authority the other way. He has carefully analyzed the case from its first inception and followed it through all its steps until its final disposition by the Supreme Court. He has cited freely from the reasons of the different Judges in all the Courts, from Justices Osler, Burton, Patterson and Gwynne, who all give the Act the wider meaning, as read by Mr. Justice Galt.

I will endeavor to avoid repeating his citations and his reasons with which I agree.

I think the petitioner has shown that this case comes under section 6, s-s. (b), and that the Company is a company "in liquidation and in process of being wound up;" and also under section 11, s-s. (b), a company which "passed a resolution requiring the company to be wound up", and also, under sub-section (e), a case in which the Court might consider whether "for any other reason it is just and equitable that the company should be wound up."

Does the case before us not come under section 6, s-s. (a)? Is the company insolvent? The English authorities all relate to bankruptcy and their Bankruptcy Act. Is there any difference between "Bankruptcy" and "Insolvency"? The dictionaries practically give these terms the same meaning and, in ordinary literature, they would be synonymous. In *Attorney General of Ontario v. Attorney General of the Dominion*, [1894] A.C. 189, the Lord Chancellor, at p. 199, in discussing this question, says: "It is to be observed that the word "bank-

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ruptcy" was apparently not used in Canadian legislation, but the insolvency law of the Province of Canada was precisely analogous to what was known in England as the bankruptcy law."

Now, did this Company commit an act of bankruptcy or insolvency? The Company has practically done no business for some years and a resolution was passed to wind up the Company and the Canadian Guaranty Trust Co. was appointed liquidator. Such a proceeding would be, in effect, the same as an assignment from an individual to a trustee for creditors. It is voluntary liquidation in both cases.

*Halsbury's Laws of England*, vol. II, p. 14, says:

"A debtor commits an act of bankruptcy if, in England or elsewhere, he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally."

And in a foot-note to this proposition, says:

"Such a disposition of property was, before being made an act of bankruptcy by statute, always regarded by the Courts as an act of bankruptcy, because it was a disposition which deprived creditors of the benefits of the bankruptcy law."

In *Bowker v. Burdekin*, 11 M. & W. 128, one of several partners had executed a deed which on its face purported to convey for himself and all the others all their personal property. It was held that, in the absence of anything to show that the deed was delivered as in escrow, the party executing the deed had committed an act of bankruptcy.

In *Stewart v. Moody*, 1 Cr. M. & R. 777, where a debtor assigned by deed all his property, it was held that it was an act of bankruptcy under 6 Geo. IV, c. 16, s. 3, although in so doing he did not intend to defeat or delay his creditors, as, that being the necessary consequence of the assignment, he must in law be taken to have intended it.

The respondent contended very strongly that the petition had not been proved. It may be that the best evidence was not furnished in support of each individual charge in the petition; but sufficient, to my mind, has been established to show that the petitioner is entitled to relief, and the respondent does not deny any one of the serious charges preferred.

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Where the interest of the liquidator, or the representative of the liquidator, is likely to clash with that of the shareholders of the company, the Courts will appoint a liquidator.

In *Re Gold Company*, 11 Ch.D., James, L.J., on pages 709, 710, says:

"There have been several cases in the Courts in which, notwithstanding that language in the Act, a contributory has obtained an order for winding up after the commencement of a voluntary winding up. The leading case, in my view of the subject, and the one which seems to me to establish the principle, is *Re West Surrey Tanning Company*, L.R. 2 Eq. 737, where the Court, in fact, came to the conclusion that the voluntary winding up, or the resolution to wind up voluntarily, was, under the circumstances, a sham. There was one man whose conduct was impeached, whose dealings and transactions with the company required investigation, and he himself had a complete majority of votes, so that he could by his own votes have determined that no proceedings should be taken against himself, and that there should be no investigation into his dealings. I can conceive a case in which that might apply to the majority of the shareholders—that is to say, where the majority of the existing shareholders were so mixed up with the matters complained of and the matters requiring investigation, that the resolution of a general meeting would be a decision by an interested judge, if I may use the expression, by persons incompetent to decide by reason of their personal interest in the matter."

In *Re West Surrey Tanning Company*, *supra*, the Court found that there was a conflict between the parties and that there were matters which required investigation,

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and consequently refused to give effect to the resolution of the company on the ground of the preponderating influence of the single shareholder, and the ordinary winding up order was made.

*Palmer's Company Precedents*, vol. II, p. 74, collects the cases and discusses the law as to the rights of a petitioning shareholder, and it is laid down there that the wishes of the majority should prevail unless it is shown that the resolution was passed fraudulently or that an investigation is required, or the circumstances are such that a voluntary winding up is likely to prejudice the shareholders.

I would affirm the order of Mr. Justice Galt, and dismiss the appeal.

RICHARDS, J.A., concurred with Perdue, Cameron and Haggart, JJ.A.

*Appeal dismissed.*

Subsequently an order was made that the costs of the petitioner be paid out of the assets of the Company.

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#### COURT OF APPEAL.

##### WATSON STILLMAN CO. v. NORTHERN ELECTRIC CO.

Before HOWELL, C.J.M., RICHARDS, PERDUE and CAMERON, JJ.A.

*Contract—Construction of—Agreement to submit differences to arbitration—Stay of proceedings—Arbitration Act, 1911, s. 6.*

The defendants had a contract with the City of Winnipeg to furnish and instal certain machinery for a well. That contract contained a clause providing for the arbitration of any disputes or differences between the parties arising from any cause whatever during the continuance of it, and this Court decided in *Northern Electric Co. v. Winnipeg*, (1913) 23 M.R. 225, that the City of Winnipeg was entitled, under section 6 of The Arbitration Act, 1911, to a stay of proceedings in an action brought against it by the present defendants to settle disputes arising out of the contract.



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This action was brought under a contract whereby the plaintiffs agreed with the defendants, upon their supplying a motor and switchboard, to practically perform the contract between the defendants and the City above referred to, and the defendants, contending that their contract with the plaintiffs provided for submission of any disputes to arbitration, applied for a similar order staying proceedings.

The clauses relied on were, in effect, that the plaintiffs agreed to do all work in accordance with and carry on all undertakings, as called for in the specifications of the City of Winnipeg thereto attached and "General Conditions" of the defendants' contract with the City also attached, and that, if any question should arise "respecting the true construction or meaning of the specifications," the same should be referred to the City Engineer of the City of Winnipeg "whose award shall be final and conclusive."

Clause 15 of the "General Conditions" above referred to provided that the work was to be executed to the satisfaction of the City Engineer and that he was to be "sole judge and arbitrator as to the mode in which the work is to be carried out . . . and also of every other matter or thing incident to, bearing upon, or arising out of . . . the contract".

The provision for a submission to arbitration contained in the defendants' contract with the City was independent of said Clause 15 and was in no way incorporated into or made part of the contract sued on.

The matters in dispute in this action did not relate to "the true construction or meaning of the specifications", the claim being to recover a small balance, alleged to be unpaid, of the contract price and damages for the same delays and defaults as charged against the defendants by the City in the other action.

*Held*, that there was nothing in the contract in question providing for a submission to arbitration of the matters in dispute and that the defendants were not entitled to a stay of proceedings, although the result would be that they would be compelled to litigate the same matters before two different tribunals—the arbitrator in one case, and by a trial in Court in the ordinary way in the other, possibly with different results.

*Per* CAMERON, J. A., Even if clause 15 of the "General Conditions" in the defendants' contract with the City could be interpreted as an agreement for a submission to arbitration as between the defendants and the City, it was quite inapplicable to, and, therefore, not part of, the agreement between the parties to this action.

ARGUED: 10th December, 1913.

DECIDED: 17th December, 1913.

ON 13th March, 1909, defendants made a contract **Statement** with the City of Winnipeg to furnish machinery for Well Number 7. On 2nd June, 1909, defendants made a

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contract with plaintiffs by which the latter agreed with the former to do all the work and furnish all the machinery to complete the defendants' contract with the City of Winnipeg, except the furnishing of an induction motor. The City was not a party to this contract of 2nd of June.

Plaintiffs brought this action against defendants in respect of a small balance, alleged to be unpaid, of the contract price and for compensation for loss and expense resulting from the same delays and default, in respect of which the Northern Electric Company so sued the City of Winnipeg. (See 23 M.R. 225.)

The latter obtained from Macdonald, J., an order staying proceedings in this action. From that order plaintiffs appealed.

*C. H. Locke* for plaintiffs, appellants, cited *Glynn v. Margetson*, 62 L.J.Q.B. 466.

*A. E. Hoskin, K.C.*, and *C. S. Tupper* for defendants, respondents, cited *Wimshurst v. Deeley*, 2 C.B. 253; *Rex v. Peto, Y. & J.* 37; *Cunliffe v. Hampton*, 2 Hudson. 274, and *Goude v. Snarr*, 34 U.C.R. 616.

HOWELL, C.J.M. The defendants entered into a contract with the City of Winnipeg to furnish certain machinery and do certain work to enforce payment for which an action was begun by them, which was stayed because of a submission to arbitration in the contract set forth fully in *Northern Electric v. Winnipeg*, 23 M.R. 225.

After the execution of the contract in that case referred to, the parties to this suit entered into the contract sued on whereby the plaintiffs agreed, upon the defendants supplying a motor and switchboard, to practically perform the contract which the defendants had entered into with the City above referred to. The first, second, third, fourth and ninth paragraphs of the contract sued on are

as follows—and the word “Company” therein represents the defendants and the word “Contractors” the plaintiffs:

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“1. The Company hereby undertakes and agrees to deliver to the contractors f.o.b. Winnipeg, duty paid:

“One 3 phase, 60 cycle, Induction Motor in accordance with the attached specification marked ‘A,’ and one switchboard panel in accordance with attached specification marked ‘B.’

“2. The contractors hereby undertake, free of all charges to the Company, the transportation of the above mentioned motor and switchboard panel from the Railway Station at Winnipeg to Well No. 7, City of Winnipeg.

“3. The contractors hereby undertake to furnish and install, free of all charges to the Company, at Well No. 7, City of Winnipeg,

“One turbine pump together with shaftings, couplings, bearings, cast iron pipe and fittings, and to install and connect the above mentioned motor and switchboard and to do all work in accordance with and carry on all undertakings as called for in specifications of the City of Winnipeg hereto attached marked ‘C’; General Conditions hereto attached marked ‘D’; Fair Wage Schedule hereto attached marked ‘E’; City Engineer’s Blueprints Nos. 3668 and 3981 marked ‘F’.

“3. The contractors hereby guarantee that, provided the motor to be supplied by the Company fulfils the specification marked ‘A’, the turbine pump will, in every respect, fulfil the requirements as called for in specification of the City of Winnipeg marked ‘B’.

“9. Should any question arise respecting the true construction or meaning of the specifications the same shall be referred to the City Engineer of the City of Winnipeg whose award shall be final and conclusive.”

The contract provides times and methods of payment by the defendants to the plaintiffs quite different from the City contract. It also provides for a penalty payable to the defendants for default or delay in the work, and there is a covenant that, in case there is no delay in the delivery of the motor by the defendants and no delay by the City, the machinery shall be ready for operation by

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a fixed date. The contract is not in any way an assignment of the City contract.

In the General Conditions referred to in the third paragraph of the contract as "D" there is the following clause:

"15. The whole of the works included in the specifications and the contract are to be executed to the satisfaction of the Engineer and in accordance with the drawings and directions furnished by him from time to time. He is to be sole judge and arbitrator as to the mode in which the work is to be carried out, whether the contractor is making satisfactory progress in view of the time for completion, the sufficiency, quality and quantity of the work done or materials furnished and also of all questions that may arise as to the meaning or interpretation of the specifications and plans, and every other matter or thing incident to, bearing upon, or arising out of these specifications and the contract."

In the contract between the defendant and the City there is the following clause:

"10. Should any question arise respecting the true construction or meaning of the specification, or should any dispute arise from any cause whatever during the continuance of this contract, the same shall be referred to the award, order and determination of the City Engineer, whose award shall be final and conclusive."

It will be observed that, in the case between the defendant and the City, clause 10 alone was referred to in the judgments.

The defendants in this action claim that the contract sued on should be construed as incorporating the submissions contained in paragraphs 15 and 10 above set out, the former being in the General Conditions attached to and referred to in the City contract as "General Conditions" of the City marked "H", and the latter being clause 10 of the engrossed contract.

Section 6 of the Manitoba Statute, 1 Geo. V, c. 1, is practically a copy of section 4 of the English Arbitration

Act, 1889, and this section is similar in substance to section 11 of the English Common Law Procedure Act, 1854. Section 9 of the local statute assumes that section 11 above referred to and other provisions of that Act are still in force here and repeals that portion thereof inconsistent with our Arbitration Act.

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The statute gives a meaning to the word "submission" and then enacts that, "if any party to a submission" commences any legal proceedings against any other party to the submission, the proceedings may be stayed.

Section 2 of the Act is as follows:

" 'Submission' means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not".

And there is the same provision in the English Arbitration Act.

The bargain between the plaintiff and the defendant was to "do all the work in accordance with and carry out all undertakings as called for in" the documents "C" "D" "E" and "F", which documents were apparently a part of the contract in question, and also were attached to and were a part of the City contract.

The engrossed City agreement was not made a part of this agreement, and there is no covenant or agreement to comply with its terms, and I cannot see any reason to hold that clause 10 became a part of this agreement.

Clause 9 of the contract sued on does make the Engineer an arbitrator or judge as to some part of the contract, and it does seem strange to think that the parties intended that a complete and full submission was to be inferred from various statements and covenants respecting arbitration found in the City contract proper, or in any of the documents referred to in it and made part of that contract.

It is upon the defendant to prove the submission like

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any other contract, and I see no more reason to infer the introduction of the submission in this case than there was in *Hamilton v. Mackie*, 5 T.L.R. 677, and *Thomas v. Portsea*, [1912] A.C. 1. In those cases it was held that, where a charter-party contained a submission and where, under it, a bill of lading was issued to a third party subject to the terms and conditions of the charter party, the submission being as to disputes between the ship owner and the shipper, it could not apply to a third party. If, however, in the like case the bill of lading had been issued to the shipper, a party to the charter party, the arbitration clause would apply: *Temperley v. Smyth*, [1905] 2 K.B. 791.

The clauses in the City contract as to arbitration are so inconsistent with the terms of the contract sued on that they cannot be imported into it.

The appeal is allowed and the order made by Mr. Justice Macdonald is set aside. The costs of the motion below and of this appeal to be costs in the cause to the plaintiff.

RICHARDS, J.A. On 13th March, 1909, the Northern Electric Co. made a contract with the City of Winnipeg to furnish and install a turbine pump, an induction motor and other machinery upon Well No. 7, of the City, according to certain Exhibits which included "specifications of the City" and "General Conditions of the City."

The contract contains this clause:

"10. Should any question arise respecting the true construction or meaning of the specification, or should any dispute arise from any cause whatever during the continuance of this contract, the same shall be referred to the award, order and determination of the City Engineer, whose award shall be final and conclusive."

On 2nd June, 1909, the Northern Co. made a contract with the Watson Stillman Co., by which the latter

(therein called the contractors) agreed with the former (therein called the company) to do all of the work and furnish all of the machinery to complete the Northern Company's contract with the City, except the furnishing of the induction motor, which the Northern Company were to deliver to them at Winnipeg. The City was not a party to this contract of 2nd June.

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This contract says:

"The contractors hereby undertake to furnish and install \* \* \* at Well No. 7, City of Winnipeg, one turbine pump, etc., \* \* \* and to do all work in accordance with and carry out all undertakings as called for in" certain exhibits, including the same specifications and "General Conditions of the City of Winnipeg" as in the contract between the Northern Co. and the City.

It also contains the following:

"9. Should any question arise respecting the true construction or meaning of the specifications the same shall be referred to the City Engineer of the City of Winnipeg, whose award shall be final and conclusive."

In the "General Conditions" which were the same in both contracts occurs this clause:

"15. The whole of the works included in the specifications and the contract are to be executed to the satisfaction of the Engineer and in accordance with the drawings and directions furnished by him from time to time. He is to be the sole judge and arbitrator as to the mode in which the work is to be carried out—whether the contractor is making satisfactory progress in view of the time for completion, the sufficiency, quality and quantity of the work done or materials furnished and also of all questions that may arise as to the meaning or interpretation of the specifications, and plans, and every other matter or thing incident to, bearing upon or arising out of these specifications and the contract."

The Northern Co. sued the City, claiming compensation for a balance of contract price alleged to be unpaid, and for loss and expense resulting from alleged delays and defaults on the part of the City. By the judgment

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of this Court, reported 23 M.R. p. 225, it was held, on the City's application, that, under clause 10 of the Northern Company's contract with the City, the City was entitled to an order, under section 6 of the Arbitration Act, 1911, and proceedings were stayed accordingly.

The action now under consideration was brought by the Watson Stillman Co. against the Northern Co. in respect of a small balance alleged to be unpaid of the contract price and for compensation for loss and expense resulting from the same alleged delays and defaults in respect of which the Northern Co. so sued the City. The latter company obtained from Mr. Justice Macdonald an order under the above mentioned section 6 staying proceedings in this action. From that order the Watson Co. have appealed.

There is nothing that in any way brings into the agreement between the two companies clause 10 of the agreement between the Northern Co. and the City under which the City succeeded in getting proceedings stayed. It is claimed, however, that, under clause 9 of the contract of 2nd June, or under clause 15 of the "General Conditions", there is to be found an agreement to refer the matter in dispute in this action to the award of the City Engineer.

Clause 9 only covers questions "respecting the true construction or meaning of the specifications." No such question is raised by the statement of claim. The damages sued for are alleged to have been caused by delays and defaults.

Clause 15, if it is incorporated in the contract of 2nd June, does not, as I read it, provide for submission to arbitration of any question whatever. It requires the works to be executed to the satisfaction of the Engineer and makes him sole judge and arbitrator as to a number of other matters. There is not a suggestion of any



question being submitted to him as an arbitrator, in respect of which he is to exercise the functions of one and to make an award between the parties. It merely requires a number of things, arising during the carrying out of the contract, to be done as he shall direct. It calls him "sole judge and arbitrator". But those words do not create a submission to arbitration. They merely refer to his power to direct how the work, etc., shall be carried out.

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It is urged that, if the order now appealed from is set aside, the Northern Co. will be in the unfortunate position of having the same questions dealt with by different tribunals—by arbitration on their claim against the City, and by a trial in Court in the ordinary way on the Watson Co.'s claim against them—and possibly with different results.

There is no doubt that the position will be an embarrassing one. But the Northern Co. have put themselves into it by entering into a very broad and comprehensive submission clause in their contract with the City, and into a greatly restricted one in their agreement with the Watson Co., which has resulted in the matters in question in the two actions, though substantially the same, being covered by the former clause but not by the latter.

Only the statement of claim has been filed. No defence has been pleaded; and at this stage, at least, of the action there is, in default of an agreement for a submission, no power in the Court to compel the plaintiffs to submit to arbitration, or to stay proceedings in default of their so doing. I do not imply that at any later stage of the pleadings the case could be referred, but merely state that at this stage it can not.

The plaintiffs are not parties to the arbitration agreement with the City, and I see no reason why they should be delayed in exercising their ordinary rights, to have the matters tried in the ordinary way.

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I would allow the appeal and set aside the order appealed against, costs of the appeal and of the order appealed against to be costs in the cause to the plaintiffs.

CAMERON, J.A. In the agreement of June 2, 1909, the Watson Stillman Co. are designated as the "contractors." It is this that gives some plausibility to the argument that clause 15 of the General Conditions, in the contract between the defendant Company and the City of Winnipeg, is applicable to and part of the above agreement under the provisions of section 3 thereof, which binds the plaintiff Company "the contractors" (as named in that agreement) "to do all work in accordance with and carry out all undertakings as called for in specifications of the City of Winnipeg hereto attached marked 'D', General Conditions hereto attached marked 'D' ", and in other particulars not here material. But the term "contractors" in clause 15 of the General Conditions refers expressly to the Northern Electric Co., as appears by the contract between that Company and the City. The second sentence of clause 15 must, therefore, be read as if it were worded:

"As between the Northern Electric Company and the City, the City Engineer is to be the sole judge and arbitrator as to the mode in which the work is to be carried out—whether the Northern Electric Co. is making satisfactory progress in view of the time for completion, the sufficiency, quality and quantity of the work done or materials furnished and also of all questions that may arise as to the meaning and interpretation of the specifications and plans and, as between the Northern Electric Co. and the City, the City Engineer is to be sole judge and arbitrator as to every other matter or thing incident to, bearing upon or arising out of the contract between the Northern Electric Co. and the City, and the specifications therein referred to."

That being, to my mind, the true intent and meaning of clause 15, it is quite inapplicable to, and, therefore, not

part of, the agreement between the parties to this action, and here in question.

I agree with the conclusion arrived at by the Chief Justice, whose judgment I have read.

PERDUE, J.A., concurred.

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*Appeal allowed.*

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NORTH WEST BATTERY, LTD. V. HARGRAVE.

Before CURRAN, J.

*Company—Allotment of shares—Action for calls—Fraud—Misrepresentation—Evidence—Corroboration—By-laws of company—Resolution of directors, proof of—Acceptance of application for shares—Notice of allotment—Application under seal.*

1. The facts constituting fraud or misrepresentation must be clearly and conclusively established; and, although the plaintiff swears positively to the misrepresentation alleged, yet, if the defendant positively denies it, and there is no reason to attach a superior degree of credit to the plaintiff's testimony, he must fail in the absence of something to corroborate it; *Kerr on Fraud*, pp. 449, 450 and 458.
2. Statements by the promoter of a company as to the amount of business expected to be done, although not justified by the results, may merely amount to favorable commendation to induce a prospective purchaser to take shares and, unless made in bad faith, will not be sufficient to enable the latter to avoid his contract thereby induced.

One of the by-laws of the plaintiff company provided that the directors, three in number, might increase their number to seven at any time "by resolution to be ratified by the shareholders in meeting". The evidence showed that at a meeting of the directors held on 12th March, 1910, they passed such a resolution, but the minutes of the meeting contained no reference to it. Subsequently, at a meeting of the shareholders, a resolution was passed "that the board of directors be increased from three to seven members, an amendment to the by-laws being put and carried to that effect."

*Held*, that the passing of the resolution of the directors to increase their number might be proved by the oath of one or more of them, and that the new board of seven directors was properly constituted, and a call upon the shares made by them was legal and binding.

*Colonial Assurance Co. v. Smith*, (1912) 22 M.R. 441, distinguished.

After sending in his application for shares and making the first payment

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the defendant sent a letter enclosing his cheque for \$200 in payment of the second instalment due according to the terms of his application, and the Company wrote him a letter acknowledging receipt.

*Held*, that, even if the defendant had not received notice of the allotment of his shares, there was a sufficient intimation of the Company's acceptance of his application to bind him.

*Semble*, The fact that the defendant's application was under seal would not bind him in the absence of the Company doing something to indicate its acceptance and communication of such acceptance to him.

*Nelson Coke and Gas Co. v. Pellatt*, 4 O. L. R. 481, distinguished.

ARGUED: 3rd November, 1913.

DECIDED: 12th December, 1913.

**Statement.** THE plaintiff was a company incorporated under and subject to the provisions of the Manitoba Joint Stock Companies Act, with its head office at the City of Winnipeg. The defendant was a merchant residing in the City of Winnipeg.

The defendant applied for 10 shares of the stock of the plaintiff company on the 17th February, 1910, by Exhibit 3. He admitted signing the application and delivering it to the Company's agent, Lovell. He had paid \$300 on account of these shares, and had made default in payment of the 20 per cent due in sixty days, amounting to \$200 and in the payment of a call of \$10 per share made on December 2, 1910, amounting to \$100. The plaintiff brought this action to recover these amounts \$300 in all.

The action was originally brought in the County Court of Winnipeg; but, owing to the nature of the defences filed, the County Court Judge before whom the case came for trial transferred it to this Court.

The defendant pleaded a number of defences, amongst them fraud and misrepresentation, by means of which the application for stock was obtained, and there was a counterclaim for the return of the money paid.

*J. B. Hugg and A. K. Dysart* for plaintiff.

*W. H. Curle and F. M. Burbidge* for defendant.

CURRAN, J. I will first deal with the defence of fraud and misrepresentation.

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The defendant alleges that he was induced to apply for the shares, and did in fact sign the application Exhibit 3, on the faith of the following statements and representations made to him by one G. J. Lovell, the duly authorized agent of the plaintiff company. (I have lettered these for convenience of reference.)

(a) That His Honour D. C. Cameron, Lieutenant-Governor of the Province of Manitoba, and E. D. Martin, of the City of Winnipeg, manufacturer, had each subscribed for 50 shares of stock in the company;

(b) That both of them (Cameron and Martin) had agreed to become directors of the company;

(c) That the plaintiff company was incorporated for the purpose of acquiring and had acquired a new invention for a battery for the manufacture and storage of electricity;

(d) That the plaintiff company had already booked orders for the batteries to the extent of \$40,000, or more;

(e) That J. D. McArthur, of the City of Winnipeg, had given an order for a number of the batteries to be used at Lac du Bonnet;

(f) That the invention had been already installed and was working in several hotels and other buildings;

(g) And had been ordered for installation in the McIntyre Block in the City of Winnipeg;

(h) That the plaintiff had a large number of Government orders to instal the said invention;

(i) That the battery was complete and ready to be put on the market; and

(j) That practically all the stock of the plaintiff company had been sold, except 10 shares.

The defendant alleges that the whole of these representations and statements were untrue and contrary to

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fact, and were made by Lovell with knowledge of their untruth, or with reckless carelessness as to the truth or falsity thereof, with intent that they should be, 'as in fact they were, acted on by the defendant; that, immediately after the defendant had notice of the falsity of the said statements and representations and before he had received any benefit from the said shares, he repudiated and disclaimed the said shares and all liability in respect thereof.

The plaintiff company in its reply admits the agency of Lovell, as alleged, and that the statements which I have lettered (b), (c), (e), (f) and (i) were made by him to the defendant; but avers that all of said statements were true. The onus of proof, therefore, of their falsity rests on the defendant. The plaintiff expressly denies that the statements lettered (a), (d), (g), (h) and (j) were in fact made by Lovell. The onus of proof that they were in fact made and of their falsity is also on the defendant.

"The law in no case presumes fraud. The presumption is always in favour of innocence, and not of guilt. In no doubtful matter does the Court lean to the conclusion of fraud. Fraud is not to be assumed on doubtful evidence. The facts constituting fraud must be clearly and conclusively established." *Kerr on Fraud*, 449, 450.

Now, the only evidence as to the statements and representations made at the time of the sale of the stock is that of the defendant and Lovell, and there is a direct contradiction between them as to what was said about Martin's connection with the company and the amount of business done or in hand. The defendant says that he was first approached to buy shares in the plaintiff company by a young man whose name he did not give, and who referred him to Lovell for further information as to the company's affairs; that Lovell called to see him at his store about the company's lighting proposition and told him that prospects were very bright, that the

company had already a very large amount of business sold, that there were between \$40,000 and \$60,000 worth of business already in hand, and that the business was phenomenal. The defendant subsequently, and on the 17th of February, 1910, called to see Lovell at his office on Main Street in the City of Winnipeg. He found Lovell waiting for him, sitting at his desk and says Lovell had in his hand a lot of papers. The defendant asked him who had shares in the company, upon which Lovell called off a number of names, amongst them the name of D. C. Cameron, and of E. D. Martin. The defendant then asked Lovell how many shares Martin had in the company, to which Lovell replied 50 shares, and that he had Martin's application for 50 shares and had his cheque for \$500 on account of the price. To this the defendant replied "All right, Mr. Lovell, this being a fact, you can make me an application for 10 shares. If Mr. Martin has risked \$5,000 I will risk \$1,000. I signed the application and came away and that was all." He further says that Lovell called out the name of D. C. Cameron as one of the shareholders of the company, either for \$5,000 or \$2,500, at least \$2,500 of stock. Also that Lovell represented to him that an order for lighting had been given by J. D. McArthur at Lac du Bonnet, that McArthur was one of the purchasers included in the \$40,000 to \$60,000 of business before mentioned.

The defendant says that he had a great deal of confidence in E. D. Martin's business capacity and agreed to become a shareholder in the company on the strength and faith of the foregoing representations, and particularly on account of Martin's alleged connection with the company. He makes this significant admission in his cross-examination: "If Martin had his 50 shares there, you would never have found me here to-day." I take it this epitomizes the defendant's whole complaint, and

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simply means that, if Martin had been a subscriber for 50 shares in the company, the defendant would have paid for his stock and made no complaint.

In any case the positive evidence of the defendant himself as to the alleged misrepresentations is confined to Lovell's statement as to the amount of business done by the company and to Martin's holdings of stock. He is not sure as to the amount of stock Cameron was represented to hold. He says it was either \$5,000 or \$2,500, at least \$2,500; but apparently he is not sure.

I do not think this is sufficiently definite, although Lovell admits that he had Cameron's name on his list for 40 shares, whereas the fact is Cameron had subscribed for only 20 shares; but appears to have been a *bona fide* shareholder to that extent.

Lovell does not appear to have been asked what statement he made to the defendant as to Cameron's holdings. I could not hold upon the evidence of the defendant that there was any material misrepresentation as to Cameron's stock.

Now, Lovell says he did use Martin's name in canvassing and that he expected Martin would take 100 shares in the company. He admits that he did mention to the defendant that Martin talked of taking shares to the amount of \$10,000; but he positively denies that he called out Martin's name from the list as alleged by the defendant, or that he represented him to the defendant as an actual shareholder; for the fact was that Martin was not then a shareholder of the company, and his name was not on the list from which Lovell was reading the names.

Martin subsequently became the holder of one share in the company and no more. Both Martin and Cameron were put on the board of directors of the company and acted as such.

Lovell admits that mention was made to the defendant of the large amount of business in sight, and of the



number of inquiries about the company's products. He says he did tell the defendant that there were prospects in sight to the extent of \$30,000 or \$40,000; but denies making any statement to the defendant to the effect that the company had actual orders for this amount of business or for any amount of business. In fact, he says, he would not, and did not, up to that time, accept any orders for the company's products. The evidence shows that it was not until after the new directors had been elected on March 26th, 1910, that orders for business were actually accepted and filled.

I have some difficulty in reaching a conclusion upon the evidence. Both the defendant and the witness Lovell impressed me as being respectable business men, candid and honest in their manner of testifying and their demeanour on cross-examination furnished absolutely no ground for believing one more than the other.

I do not think the defendant intentionally mis-stated anything in connection with his purchase of the stock in question; but I am inclined to the belief that he is mistaken as to what Lovell actually did represent as fact and not expectation. It seems to me highly improbable that Lovell, a presumably honest man, and possessing the knowledge and experience that a stock broker and company promoter would naturally have, would be so extremely unwise and foolish, not to say dishonest, under the circumstances of this case, as to deliberately tell the defendant that Martin was a shareholder in the company when such was not the case, because of the position in which the parties were placed and the circumstances under which this representation is said to have been made. The two men were together in Lovell's office. Lovell held in his hand what purported to be a list of the company's shareholders, or rather, of persons who had subscribed for stock in the company. At the request of the defendant for information as to who the shareholders

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were, Lovell began to read off the names of such shareholders from the list which he had in his hand. At any moment during this interview the defendant might reasonably have been expected to have asked Lovell to permit him to make a personal inspection of the list, in which event the untrue statement as to Martin would instantly have been detected. It seems to me unreasonable that Lovell would have taken this risk and that the defendant is mistaken in his recollection of what Lovell did in fact state as to Martin's connection with the company.

It is evident that a great deal more was said during this interview respecting the company's affairs than can be gathered from the defendant's evidence, and I think it highly probable that Lovell did discuss with the defendant the probability of E. D. Martin becoming a substantial shareholder in the company and that, possibly, Lovell did make use of this argument to induce the defendant to also buy stock; but this is a very different matter from actually representing as a fact that Martin was then a holder of 50 shares.

I am inclined to think that the representations made by Lovell as to the company's business were merely the favourable commendations that a promoter would most likely make concerning the affairs of a company and to present its stock as an investment proposition in the best light to prospective buyers. And here again I think the defendant has misunderstood what Lovell said as to the business of the company, and confused future prospects with actual business then in hand.

Lovell says that he confidently expected that Martin would become a shareholder for at least 100 shares. He was not asked particularly as to the reasons or grounds of his belief in this matter, but from the evidence of other witnesses, it is apparent that Martin, after becoming a shareholder, attended meetings and took an active

part, for a time at any rate, in the company's business. Martin himself was not called as a witness, and I am unable, therefore, to form any conclusion as to what foundation in fact Lovell had for entertaining the belief he did, with regard to Martin's becoming a shareholder in the company.

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The defendant's testimony is wholly uncorroborated, and, while I believe him to have been perfectly honest in his desire to tell the truth, still I find it hard to believe that Lovell did deliberately lie to him about Martin's stock, and about the orders for business received by the company.

*Kerr on Fraud*, at p. 458, lays down the law under such circumstances as follows:

"The testimony of a single witness, though uncorroborated, may be sufficient for the Court to conclude that there has been fraud"; but he goes on to say, "Nor can the testimony of one single witness, unless supported by corroborating circumstances, be allowed to prevail against a positive denial by the answer. If a defendant positively denies the assertion, and one witness only proves it as positively, and there is no corroborating circumstance attaching to the assertion, the Court will not act upon the testimony of that witness, without some circumstances attaching a superior degree of credit to the latter."

Now, I am wholly unable to find in the evidence any circumstance from which I ought to or can attach a superior degree of credit to the defendant rather than to Lovell. Whatever circumstances there are—such as the probability or improbability of the story as told by the defendant—incline me to accept Lovell's statement as to what really took place rather than that of the defendant. In the light of all the surrounding circumstances, I think it is more probable that what Lovell says is correct than what the defendant says. This is the only test I can apply and, bearing in mind the well established legal principles before referred to, that he who alleges fraud

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must strictly prove it, I cannot conscientiously say that the defendant has convinced me that the misrepresentations he alleges to have been made to him by Lovell were in fact made. Furthermore, his conduct in lying by from November, 1910, when he says he became aware of the alleged fraud, until he was sued by the company, without taking any overt action of his own for redress, does not incline me to the belief that he then seriously regarded what he now complains of as a matter entitling him to set aside the whole transaction. I think he should have promptly followed up his repudiation by active steps for redress.

It is apparent that the plaintiff company ignored his contentions and continued to treat him as a stock holder, from the fact of Exhibit 11, dated December 8, 1910, being sent to him in his capacity as shareholder. The defendant admits getting Exhibit 13, a letter or official notice from the company, dated October 19, 1910, demanding payment of the \$200 past due on the purchase price of his stock. This refers to the \$200 item of the plaintiff's claim herein.

In his evidence he says, "I did not answer it (Exhibit 11) or take any action upon it" and it was not until he received Exhibit 9, dated November 7, 1910, that he decided to act. He then, he says, in consequence of the reference therein to the company's financial position, went to the company's office for information, and from information then and there received from the company's secretary, Mr. Clark, he determined to repudiate his share liability.

I think I must hold, upon the best consideration that I am able to give the evidence, that the defendant has failed to satisfy the onus resting upon him, and has failed to make out the case of fraud and misrepresentation alleged in his statement of defence.

Next as to the claim for \$100. The plaintiff put in a

certificate, Exhibit 1, under section 53 of the Joint Stock Companies Act, as *prima facie* proof of the matters referred to in that section, and particularly of the defendant's liability for the 10 per cent call. The onus of proof was then shifted to the defendant.

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His other defences are, (1) denial that plaintiff accepted the application or allotted the stock; (2) if there was allotment, then no notice to the defendant; (3) denial that the call of \$10 per share was made as alleged or at all; (4) allegation that such call was not made in accordance with the Joint Stock Companies Act and the by-laws of the company, because,—(a) the directors making the same were not duly qualified or elected, in that the meeting was not properly convened and that there was no quorum; (b) because the amount, time and place of payment were not specified in such call, nor thirty days' notice or any notice of call given the defendant.

According to the terms of the defendant's application for shares, the balance of the purchase price, to wit 50 per cent, if required to be paid in, may be so required on calls of not more than 10 per cent each, notice of such calls to be given at least 30 days in advance. The plaintiff's register of shareholders was put in as Exhibit 4, and the name "J. Hargrave" appears on page 8, opposite to which, in the proper column, headed ledger folio, appears the number "36". A reference to page 36 of the same Exhibit, shows it purports to be the stock ledger folio of the defendant's share account. The entries here indicate that the defendant was the holder of ten shares of the par value of \$1,000 upon which \$300 has been paid, leaving an unpaid balance of \$700.

The company's minute book was put in as Exhibit 5. It contains a copy of the plaintiff's charter, pages 3 to 11, both inclusive, the general by-laws of the company, pages 21 to 29, both inclusive, and minutes of directors'

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and shareholders' meetings. The first meeting of shareholders was held on the 31st day of May, 1909, at which George K. W. Watson, George A. H. Dysart and Charles O. Smith were elected directors of the company. The first meeting of directors was held on the same day at a later hour, at which the general by-laws found on pages 21 to 29 were passed. Subsequently Charles O. Smith resigned from the directorate and was succeeded by George P. Might.

By-law No. 9 fixes the number of directors at three. By-law No. 6 prescribes two directors as sufficient to constitute a quorum. By-law No. 9 provides that the directors may increase their number to seven at any time by resolution to be ratified by the shareholders in meeting. This is the language used in the by-law. At page 85 of the minute book appear the minutes of a directors' meeting held on the 12th March, 1910. All directors were present and the minutes are sworn to as being correct by Mr. Dysart, the company's secretary, and the same are in his hand-writing. The list of subscribers for shares was presented at the meeting and a resolution was duly passed allotting stock to the different persons whose names appear in the list set out in these minutes. The name of D. C. Cameron appears as the allottee of 20 shares and that of the defendant as the allottee of 10 shares. By resolution of the directors a special meeting of shareholders was then directed to be held on March 26th following, at three o'clock.

At page 88 of Exhibit 5 are the minutes of this special meeting of shareholders. The notice calling the meeting could not be produced. Mr. Dysart, the secretary of the company, swore that he had made careful search for an original or copy of the notice in question, but was unable to find any. He stated on oath that he drew the notice himself and was familiar with that part of its contents which related to the business to be transacted. He says a

copy of this notice was mailed under registered cover to each shareholder to whom stock had been allotted, or who had subscribed for stock more than seven days prior to the date fixed for the meeting.

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I allowed him to give, as far as he was able, the contents of the notice of the shareholders' meeting, which was, according to his evidence, that the special business to be transacted was election of directors and increasing the number of directors from three to seven. The admission of this evidence was objected to by the defendant, but I thought it proper, under the circumstances, to admit it.

A reference to the minutes of the shareholders' meeting at page 88 shows the following statement by the secretary: "The secretary then stated that proper notice of the meeting had been served upon all shareholders", and the following resolution:

"It was then moved, seconded and carried, that the board of directors be increased from three to seven members, an amendment to the by-laws being put and carried to that effect."

Then follows the record of the nomination of certain gentlemen for directors, the taking of a ballot and the statement that D. C. Cameron, W. H. Cross, Joseph Maw, W. L. Parrish, C. A. Flower, E. D. Martin and E. F. Comber were declared duly elected as the directors of the company.

There is no record of a formal or other resolution of directors at a previous meeting authorizing the increase in the directorate from three to seven, as required by By-law No. 9; but there is the evidence of Mr. Dysart that the old directors, three in number, agreed and decided upon the increase at their meeting held on March 12th, that the object was to get the old board to resign and elect a new board of seven directors. All three of the old directors were present at the shareholders' meet-

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ing on March 26th, and took part in the proceedings and none of them was re-elected. It is evident that there was an agreement or decision arrived at by all three of the old directors to increase the number of directors to seven, but that no formal resolution to this effect appears in the minutes of directors' meetings. Is this a sufficient compliance with By-law No. 9?

The plaintiff admits that, if the new directors who imposed the call were illegally elected, the call was and is invalid. The defendant's counsel argued very forcibly that the shareholders could not effect the increase in the directorate in the absence of a previous resolution of the directors, and cites *Colonial Assurance Co. v. Smith*, 22 M.R. 441, as an authority for this contention.

That case decides that, when the power to pass by-laws for certain purposes has been conferred upon, or delegated to, the directors, it cannot be exercised by the shareholders in the absence of something in the Act of Incorporation which gives them that right. This seems to be the law in Ontario and was so laid down by Mulock, C.J., in *Kelly v. Electrical Construction Co.*, 10 O.W.R. 710, he says:

"I am therefore of opinion that the express power conferred by section 47 (of the Ontario Companies Act) upon the board of directors to pass by-laws respecting proxies deprives the body at large of any inherent power to deal with that subject."

And an originating shareholders' by-law respecting proxies was held to be null and void.

The provisions of the Ontario Companies Act are substantially the same as in our Joint Stock Companies Act with respect to the powers delegated to directors.

Sub-section (a) of section 31 of our Act has been cited by the plaintiff's counsel as an authority for giving the shareholders the power to increase the number of their directors at the above meeting. I have consid-



ered this section and do not think it can be invoked for this purpose. I take it that this sub-section applies only to meetings which have been convened as the section indicates by one-fourth part in value of the shareholders of the company. The meeting of March 26 was not so convened; there was no requisition of the shareholders for the calling of this meeting and specifying the business to be transacted thereat, and, in any case, I do not think that at such a special shareholders' meeting the shareholders would have any greater powers than shareholders would have at the annual general, or any special general, meeting of shareholders convened in the ordinary way, or that at such a meeting held under sub-section (a) the shareholders could transact business which had been expressly delegated to the directors, such as the increase in the number of directors. This must originate with the directors and all the shareholders can do is to either confirm or reject what the directors have decided upon. They have already confirmed the by-laws which fix the directorate at three and provide for an increase in a certain way. But the plaintiff's counsel seeks to avail himself of the provisions of another by-law, namely By-law No. 21, which is in these words:

"The foregoing by-laws may be amended, repealed or added to in general or special meeting of the shareholders of the company by vote of two-thirds of the shares represented at such meeting, provided that notice of such intended amendment, repeal or addition shall be inserted in the notice calling such meeting."

If this by-law can be invoked, I think it reserves to the general body of the shareholders ample power to amend, repeal or add to any by-law which the directors have passed, and which the shareholders have confirmed. Unfortunately, however, for the plaintiff no proof has been adduced that the amending by-law of March 26, increasing the number of directors from three to seven, was passed by a two-thirds

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vote as required by By-law No. 21, or that the other requisites of this by-law have been complied with. For this reason I am of opinion that this by-law does not in any way assist the plaintiff to uphold what the shareholders did, if it cannot be upheld on other grounds, namely, that what the directors did at their meeting on March 12th was in effect a resolution of that body for the proposed increase in the directorate and that the subsequent action of the shareholders on March 26th was in effect a confirmation of such action.

It is true that there is no written record of any such resolution of directors; but is this absolutely necessary to the validity of the directors' acts by resolution where a by-law under seal is not required? I do not think it is. The essential matter is, did the directors act or do a certain thing? If they did, how may it be proved? Surely by the testimony of one of their number present and participating in the act itself. The fact to be determined is, did the three directors agree and determine upon the increase of the number of directors? The usual way to do this would, of course, be by a resolution which would be spread upon the minutes of their meeting. It is a matter of common knowledge that many resolutions at directors' meetings, as well as at other meetings, are verbally put and carried by the meeting and afterwards reduced to writing and couched in more formal language than that used by the mover of the resolution. I take it that the writing is only a means of preserving an accurate record of what was done, but is not of itself evidence of what was done without further proof, and is not the only means of proving acts done at such meetings.

This is not a case where I should be astute to find flaws. I am satisfied that the three old directors were unanimous in agreeing and deciding that the board should be increased to seven and did decide this amongst

themselves at the meeting of the 12th of March. Mr. Dysart, himself one of the three directors and the company's secretary, says:

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"I don't think any formal by-law of directors was passed on 12th March to increase the number of directors, that is, no written by-law. The matter was discussed and agreed to and intended to be dealt with in the shareholders' meeting."

I hold on this evidence that what was so done by these three directors, if not technically a resolution, yet was so in effect, and should have all the force of a resolution for that purpose, and as fully indicated the mind and will of the directors upon this question as any formally worded resolution of theirs could do.

I hold that the action of the shareholders on March 26 following was in reality confirmatory of the directors' decision, that the new board of seven directors was validly constituted and elected, and that the call of 10 per cent was properly made by these directors by resolution at a meeting held on December 2, 1910; see page 135 of Exhibit 5. I think the amount, time and place of payment of this call are properly set forth in the resolution, and that the defendant had proper and sufficient notice of the call by Exhibit 11, which is produced by himself.

The allotment of the stock to the defendant is clearly proved by the resolution of the directors of March 12, 1910; see pages 85 and 88 of Exhibit 5. Mr. Dysart, the secretary of the company, swears that notice of allotment was mailed to each shareholder at the same time that the notices of the shareholders' meeting were mailed. He says:

"We (meaning Lovell and himself) had a very carefully revised list of shareholders according to which both sets of notices were sent out."

By-law No. 5 provides how notices of shareholders'

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meetings are to be given, namely, by registered mail, postage prepaid, to each shareholder, etc. It further provides that omission or neglect to give notice of any meeting shall not invalidate any resolution, by-law or matter transacted at such meeting, but any shareholder absent because of want of notice may re-open any business done in his absence and have a fresh vote at the next succeeding meeting of which he receives due notice.

This provision would seem to cure any irregularity in the calling of shareholders' meetings arising from want of notice and provides a remedy. The defendant had this remedy open to him and has failed to avail himself of it. I think he is bound by what was done at the shareholders' meeting of March 26.

The defendant swears he did not receive either notice of allotment or notice of shareholders' meeting. It is quite possible that he is mistaken in this and has forgotten the fact. It appears that he received all other communications from the company sent through the mail, and it does seem strange that these two all important notices are the only ones that have miscarried. However, as to the notice of allotment, I do not see that it makes much difference, because the defendant received the letter of June 14, 1910, Exhibit 12, from the plaintiff company, acknowledging receipt from the defendant of \$200 on account of his stock. This, I think, is sufficient intimation of the company's acceptance of his application. It acknowledged payment of what was sent to pay the second instalment due according to the terms of the application. The defendant appears to have sent his cheque for the amount to the plaintiff in a letter dated June 13, 1910. Why did he send this, if he had received no notice from the company? He offers no explanation. The acceptance by the company may be communicated either verbally or by letter or by conduct. I think the plaintiff's conduct in taking and accepting the defend-

ant's money on account of his shares is conduct from which acceptance must be inferred.

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In *Re Imperial Land Co. (Harris' case)*, L.R. 7 Ch. 587, it was held that the contract was complete when the letter announcing the allotment of shares was put into the post. James, L.J., says at p. 592:

"It (referring to the contract) was complete in exactly the way which the appellant desired, that is to say, he gave his address in Dublin and the company, according to the ordinary usage of mankind in these matters, returned their answer through the post. That is a complete contract. \* \* \* The contract was completed at the time when the letter of allotment was properly posted by the company."

It is true that in that case the letter was received by the defendant, but before receiving it he had written the company revoking his offer to take shares and the question was, when was the contract complete?

See also *Household Fire Insurance Co. v. Grant*, 4 Ex. D. 216.

Now the defendant in his application, and immediately below his signature, gave his address as 334 Main Street, and I think impliedly intimated thereby that communications from the company might be sent to him by post to that address. The address was used by the company in its formal communications to the defendant, Exhibits 11 and 13, both of which the defendant received.

In speaking of the notices in question, Mr. Dysart says he checked up with Mr. Lovell all the names. "I signed them (the notices) and we (Lovell and Dysart) went and mailed them." The defendant's name appeared in the list of shareholders to whom stock had been allotted and I have no doubt at all that notice of allotment was duly mailed to the defendant, and, if he did not receive it through the fault of the post office, the company is not responsible for that.

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The plaintiff's counsel, however, argues that, as the application was under seal, it was not revocable, and cites *Nelson Coke and Gas Co. v. Pellatt*, 4 O.L.R. 481, as an authority for this proposition. I have looked at that case and think it is clearly distinguishable. There the defendants and associates covenanted under seal to become shareholders in the company when incorporated for a stated amount of its capital stock when the same should be issued and allotted to them and to accept the stock when allotted to them and to pay for it. The Court held that the undertaking, being by deed for valuable consideration and delivered to the agent of the company, was not revocable as a mere offer would be.

The case of *Re Provincial Grocers*, 10 O.L.R. 705, seems to me very much in point and indicates the distinction between an offer under seal to purchase shares which a company is not obliged to sell and the case of an agreement under seal to accept and pay for shares on mere issue and allotment. In this latter case it was held that the instrument signed by the respondent, being under seal, was not a mere offer which he could withdraw before acceptance, but that before the respondent should become a shareholder it was necessary that the company should do something equivalent to an acceptance, something either by words or conduct which satisfies the Court that the offer had been accepted to the knowledge of the person who made it; and, as the company had never accepted or intended to accept the respondent as a shareholder, he was not bound.

The fact, therefore, that the defendant's offer was under seal does not, in my judgment, dispense with the necessity for the company doing something to indicate its acceptance and communication of such acceptance to the defendant.

I must hold that all grounds of defence fail, and there

will be judgment for the plaintiff for \$300 with interest at 5 per cent upon \$100, the 10 per cent call, from the 11th January, 1911, and upon \$200 from the 17th May, 1910, with costs of suit.

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## RE BUCHANAN.

Before GALT, J.

*Prohibition—Summary trial of indictable offence—Appeal from magistrate—Secret Commissions Act, 1909, (Dom.) c. 33, s. 3.*

The applicant was tried before a Provincial Police Magistrate on a charge laid under section 3 of the Secret Commissions Act, 1909, (Dom.) c. 33, s. 3, and the charge was dismissed.

*Held*, upon the evidence, that the matter had been dealt with by the Magistrate as a summary trial of an indictable offence and not as a summary conviction proceeding, and that, as no appeal lies to a County Court Judge from the decision of a Magistrate in the former case, an order should be made to prohibit the County Court Judge from proceeding to hear an appeal made to him by the prosecutor against the Magistrate's decision.

*Held*, also, that it was proper to make the order as soon as the prosecutor had served his notice of appeal, and it was not necessary to wait and raise the objection before the County Court Judge.

*Curlewis & Edwards' Law of Prohibition*, at pages 381-387, referred to. *Mayor of London v. Cox*, (1867) L.R. 2 H.L. 239, followed.

ARGUED: 18th December, 1913.

DECIDED: 18th December, 1913.

APPLICATION on behalf of the accused R. A. Buchanan, for prohibition to his Honor Judge Ryan at the County Court, Portage la Prairie, in respect of an appeal of one Bannerman, an informant in certain Police Court proceedings. Statement.

*H. W. Whittle, K.C.*, and *M. Hyman* for Buchanan.

*W. Hollands* for the informant.

GALT, J. This is an application on behalf of the accused, R. A. Buchanan, for prohibition to his Honor, Judge Ryan, in the County Court, Portage la Prairie, in respect of an appeal by one Bannerman, an informant in

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certain Police Court proceedings. It appears that an information was laid by Bannerman against Buchanan for an offence under the Secret Commissions Act. The matter was tried on several days before A. L. Bonnycastle, Provincial Police Magistrate, and on 27th October, 1913, the charge was dismissed.

An appeal was lodged by the informant against the Magistrate's decision, and notice of appeal was given for the case to be heard at the County Court, Portage la Prairie, commencing on December 22nd.

Buchanan now applies for prohibition, directed to his Honor, Judge Ryan, in the County Court, upon the ground that there is no appeal from the said dismissal of the complaint by the said Police Magistrate.

It is admitted by the parties that, if this trial was a summary trial of an indictable offence under Part XVI of the Code, there is no appeal, but, if on the contrary it was a summary conviction under Part XV of the Code, there is an appeal.

Evidence has been produced upon affidavits by both parties.

Buchanan states that (Par. 7):

"At the trial of the said charge, the said Magistrate, A. L. Bonnycastle, Esq., called upon me as the accused to elect as to whether I should take a jury trial or be tried summarily before him, the said Magistrate, on the said charge, and I duly elected to be tried by the said Magistrate summarily for the offence as laid in the said charge."

(Par. 8): "At the time of my election aforesaid, I verily believed that I was being tried for an indictable offence, and I submitted to the jurisdiction of the Magistrate and agreed to be tried by him."

In answer to the application for prohibition an affidavit is produced by Mr. R. A. Bonnar, who acted as counsel for the said Bannerman, and he states, amongst other things, as follows:



(Par. 4): "That I was well aware of the fact that an appeal would lie in the first instance and, after a consultation with my client, we came to the conclusion that it was better to have the accused tried in a summary conviction manner, so that an appeal would lie."

(Par. 5): "That it was agreed between myself and H. W. Whitla, K.C., who appeared for the accused, that the trial should be that of a summary conviction trial."

(Par. 6): "That I was in Court when the trial started, and the accused was not put to his election as to whether he should be tried by a jury or the Magistrate, during said trial, or prior to said trial, or in my presence, or while the Court was sitting on said case, but, on the contrary, the accused was simply asked by the Magistrate whether he pleaded guilty or not guilty, to which the accused replied, 'not guilty'".

Other affidavits were also put in in reference to the matter, but, in view of the strong statement which was made by Mr. Bonnar respecting the alleged agreement with Mr. Whitla, I allowed the matter to stand over until the earliest possible time when an affidavit could be obtained from Mr. Whitla, then engaged on professional business in the City of Ottawa. Mr. Whitla's business having terminated sooner than the parties contemplated, he returned to Winnipeg, and yesterday made an affidavit practically contradicting Mr. Bonnar's affidavit in every material respect. It is extremely regrettable that such a state of affairs should appear before the Court, these conflicting statements made by eminent counsel, but I have no hesitation whatever, after reading the material filed before me, including an affidavit made by Mr. Bonnycastle, and especially the record indorsed on the information, which sets out the election of the accused in the manner he himself has mentioned, in accepting the statement of Mr. Whitla in preference to that of Mr. Bonnar, as to what really took place. Mr. Hollands asked for an adjournment in order to cross-examine Mr. Whitla upon his affidavit, but I permitted this cross-

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examination to take place before me, and Mr. Whittle was cross-examined accordingly.

The case does not rest there, so far as the applicant's position is concerned. We have a copy of the information with the entry indorsed thereon which is the record of the Court in connection with this matter before us here, and it shows that the court made to the accused the statements contained in sub-section 2, section 778, of the Criminal Code and the prisoner thereupon consented to being tried summarily and pleaded not guilty. I should doubt very much, in the face of such a statement as that upon the record produced from the Court, especially when verified by an affidavit of the man himself who made the election, whether any arrangement which might be made between counsel beforehand could possibly be allowed to interfere with the rights which the accused person would have under the record as it appears. I cannot help feeling that Mr. Bonnar must, in some way or other, have discussed this matter previously with his own client, or possibly a partner, and now imagines it was with the counsel for the accused.

Mr Hollands has produced an affidavit from one Fred J. Shaw, Special Agent for the Canadian Northern Railway Company, who produced from the Police Magistrate the receipt for the sum of twenty-five dollars to cover the cost of the proposed appeal. The receipt sets forth a recital that the complaint heard by the Magistrate was "for a summary conviction offence", and Mr. Hollands relies upon this as being evidence that this was in truth the form of trial. At the same time Mr. Hollands admits that this lengthy receipt was drawn up in his own office, and all the phraseology of it was prepared there. As far as I can see, all the Magistrate would be interested in would be to see that a receipt was given for the \$25. An affidavit was then prepared to be sworn to by Mr. Bonnycastle, and this affidavit has been tendered and

received by me as evidence, in spite of the objection raised by Mr. Hollands that he desired to have the liberty of cross-examining Mr. Bonnycastle upon it, pursuant to Rule No. 474 in the King's Bench Rules.

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I am not satisfied that the matter with which I am dealing is an "action or proceeding", within the meaning of that rule. When this matter came originally before me, it was explained by counsel on both sides that if the appeal went on, witnesses would have to be procured from a long distance, and it would not be possible to procure their attendance in less than several days before December 22nd, for which day notice of appeal had been given. In order to oblige the parties, I fixed a day to dispose of this matter and, as a matter of fact, I have adjourned the trial of a case on which I am engaged, for the purpose of hearing and disposing of this particular motion. I think there must be some latitude in a Judge hearing motions of this nature, not to allow adjournments or postponements, where it would appear to be contrary to justice to allow them.

I feel quite satisfied that this man Buchanan made his election; the records of the Police Court show that he did so, and I do not think that any cross-examination which Mr. Hollands might make of the Magistrate, Mr. Bonnycastle, would affect my decision in the slightest. But it is urged by Mr. Hollands that the County Court Judge would have power to deal with this matter when the appeal comes up before him, and for this reason it is improper that I should do so. I do not agree with this contention. I will not take up time by going through several passages which are contained in *Curlewis & Edward's Law of Prohibition*. In the chapter on "*Quia Timet*" Applications, commencing on page 373, the learned editors show that it is quite proper to prohibit an appeal or other proceeding of an inferior Court where the applicant establishes a defect of jurisdiction. I refer

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especially to pages 381 to 387. At the top of page 386, from one of the judgments I quote the following:

"The course open to a defendant where the Court is without jurisdiction is two-fold. He may on that ground apply to this Court for a prohibition before the case comes on in the District Court or he may go before the District Court either actually or by awaiting its decision."

And on page 387:

"The rule is clearly laid down in *Mayor of London v. Cox*, L.R. 2 H.L. 239, that, where want of jurisdiction is apparent upon the face of the proceedings, prohibition goes at any time after service of the process, i.e., as soon as the jurisdiction of the inferior Court is asserted. It does not matter what the originating proceeding is; as soon as it is filed the proceedings are begun and, if the want of jurisdiction appears on the face of them, any person may apply to restrain the Court from further proceeding."

In the present instance, the informant has served his notice of appeal and, under the Statute in that behalf, he must have filed it before serving it.

I think nothing is wanting to show that the appeal has now been launched before the County Court Judge, and, as I consider that there is in this case no appeal, I think the proper course is for me to grant the order of prohibition. The applicant is entitled to his costs of the motion.

## APPENDIX I.

Memorandum respecting appeals to the Privy Council and the Supreme Court:—

### SUPREME COURT.

*Colwell v. Neufeld*, 19 M.R. 517. Appeal dismissed, 48 S.C.R. 5.

*Gold Medal Furniture Co. v. Stephenson*, 23 M.R. 159. Appeal quashed, 48 S.C.R. 497.

*Lafendal v. Northern Foundry Co.*, 22 M.R. 207. Settled before argument.

*Lumbers v. Montgomery*, 22 M.R. 735. Reversed. Judgment of ROBSON, J., restored, 5 W.W.R. 60.

*Richardson v. Beamish*, 23 M.R. 306. Appeal argued. Stands for judgment.

*Schwartz v. Winnipeg Electric Railway Co.*, 23 M.R. 688. Affirmed 49 S.C.R. 80.

*Winnipeg Steel Granary and Culvert Co. v. Canada Ingot Iron Culvert Co.*, 22 M.R. 576. Appeal abandoned before argument.

### PRIVY COUNCIL.

*Brandon Gas and Power Co. v. Brandon Creamery Co.*, 22 M.R. 655. Petition for leave to appeal refused.

*Canada Law Book Co. v. Butterworth*, 23 M.R. 352. Affirmed, 26 W.L.R. 937.



## APPENDIX II.

### RULES.

The Court of King's Bench with the concurrence of the undersigned, being a majority of the Judges of said Court, at a meeting this day held for that purpose, hereby orders that the following rule be adopted:—

500A. If in any case the Court or a Judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission. The Forms 161 and 162 in the schedule hereto and hereby added to the schedule of Forms appended to the Rules of Court, shall be used for such order and request respectively, with such variations as circumstances may require.

Dated at the Court House, this 25th day of February, A.D. 1914.

T. G. MATHERS, C.J., K.B.

D. A. MACDONALD, J.

A. C. GALT, J.

J. P. CURRAN, J.

## SCHEDULE TO RULE 500 A.

No. 161.

### ORDER FOR ISSUE OF REQUEST FOR COMMISSION.

Rule No. 500 A.

IN THE KING'S BENCH.

BETWEEN:

A.B.

Plaintiff.

and

C.D.

Defendant.

UPON HEARING

and upon reading the affidavit of  
filed the                      day of

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IT IS ORDERED that a letter of request do issue directed to the proper tribunal for the examination of the following witnesses, that is to say:

E. F. of

G. H. of

and I. J. of

AND IT IS ORDERED that the depositions taken pursuant thereto, when received, be filed with of the Court of King's Bench for Manitoba, and be given in evidence on the trial of this action, saving all just exceptions.

AND IT IS FURTHER ORDERED that the trial of this action be stayed until the said depositions have been filed.

Dated this

day of

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REQUEST FOR COMMISSION.

Rule No. 500 A.

(Heading:—To the President and Judges of &c., &c., as the case may be).  
WHEREAS an action is now pending in the Court of King's Bench for Manitoba, in which A. B. is plaintiff and C. D. is defendant. And in the said action the plaintiff claims

(State briefly the cause of action)

AND WHEREAS it has been represented to the said Court that it is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties, that the following persons should be examined as witnesses upon oath touching such matters, that is to say:

E. F. of

G. H. of

and I. J. of

And it appearing that such witnesses are resident within the jurisdiction of your Honorable Court.

Now I.....as the Chief Justice of the Court of King's Bench for Manitoba have the honour to request, and do hereby request, that for the reasons aforesaid, and for the assistance of the Court of King's Bench for Manitoba, you as President and Judges of the said.....or some one or more of you, will be pleased to summon the said witnesses (and such other witnesses as the agents of the said plaintiff and defendant shall humbly request you in writing so to summon) to attend at such time and place as you shall appoint before some one or more of you, or such other person as according to the procedure of your Court is competent to take the examination of witnesses, and that you will cause such witnesses to be examined upon the interrogatories which accompany this letter of request (or viva voce) touching the said matters in question in the presence of the agents of the plaintiff and defendant, or such of them as shall, on due notice given, attend such examination.

And I further have the honour to request that you will be pleased to cause the answers of the said witnesses to be reduced into writing, and all books, letters, papers, and documents, produced upon such examination to be duly marked for identification, and that you will be further pleased to authenticate such examination by the seal of your tribunal, or in such other way as in accordance with your procedure, and to return the same, together with such request in writing, if any, for the examination of other witnesses, through

for transmission to  
of the Court of King's Bench for Manitoba.

WITNESS the Honourable  
Chief Justice of the Court of King's Bench for Manitoba, the  
day of ..... in the year of our Lord  
one thousand nine hundred and .....



# A DIGEST

OF

## ALL THE CASES REPORTED IN THIS VOLUME

BEING DECISIONS IN

## THE COURT OF APPEAL

AND

## THE COURT OF KING'S BENCH

## FOR MANITOBA.

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### **ABANDONMENT.**

*See* COMPANY, 1.  
*See* VENDOR AND PURCHASER, 2.

### **ACCELERATION OF TIME FOR PAYMENT.**

*See* INSURANCE ON LIVE STOCK.

### **ACCEPTANCE.**

*See* COMPANY, 4.  
*See* CONTRACT, 1.

### **ACQUIESCENCE.**

*See* RAILWAYS, 1.

### **ACTION AT ISSUE.**

*See* PRACTICE, 2.

### **ACTION OF DECEIT.**

*See* ASSIGNMENT OF CHOSE IN  
ACTION.

### **ACTION OF TORT.**

*See* FRAUDULENT CONVEYANCE.

### **ADMINISTRATION OF ESTATES.**

*See* VENDOR AND PURCHASER, 6.

### **ADMISSIONS.**

*See* PRACTICE, 5.

### **AFFIDAVIT.**

*See* ELECTION PETITION, 4.  
*See* WINDING-UP OF COMPANY, 1.

### **AGENCY.**

*See* CONTRACT, 1.

### **AGENT OF CORPORATION.**

*See* LANDLORD AND TENANT, 3.

### **AGREEMENT FOR EXCHANGE OF LAND.**

*See* PRINCIPAL AND AGENT, 5.

### **AGREEMENT FOR LEASE.**

*See* LANDLORD AND TENANT, 3.

### **AGREEMENT OF SALE OF LAND**

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### **AGREEMENT TO GIVE MORTGAGE.**

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**APPEAL TO PRIVY COUNCIL.**

See ELECTION PETITION, 3.

**ARBITRATION AND AWARD.**

1. *Railways — Railway Act, R.S.C. 1906, c. 37, s. 192, s-s. 2, as amended by 8 & 9 Edw. VII, c. 32, s. 3—Meaning of expression "arbitration now pending"—Compensation for lands taken—Date as of which compensation to be ascertained—Construction of statutes.*—An arbitration is not com-

menced or pending until arbitrators have been appointed and they cannot be said to be appointed until they have accepted office as such, and an arbitration under the Railway Act, R.S.C. 1906, c. 37, to determine the compensation to be paid to a land owner for lands compulsorily taken cannot be said to be pending until, at the earliest, the arbitrators have been sworn under section 197 of the Act.

*Ringland v. Lowndes*, (1863) 15 C.B.N.S. 173, and *Baker v. Stephens*, (1867) L.R. 2 Q.B. 523, followed.

The proceedings in this matter were commenced in 1906 by the service on Taylor of the usual notice of expropriation offering \$7500 for the property. Taylor did not accept the offer and, in 1907, an order was made, under section 196 of the Act, appointing three arbitrators to determine the compensation. Mr. Galt, one of these three, refused to act and nothing was done under the order. In April, 1910, the Railway Company, with the consent of the owner, withdrew its former offer and made a new offer of \$17,000 for the property and, on 4th May, 1910, an order was made by consent, reciting the former order and the refusal of Mr. Galt to act, and appointing two of the former arbitrators and a third as "arbitrators for the purpose of hearing and determining the arbitration in this matter."

They did not enter upon the reference until May, 1912. In making their award, they ascertained the compensation payable as of the date of the deposit of

the plan, &c., which was 1st November, 1906, acting on sub-section 2 of section 192 of the Act.

The Railway Company had not yet acquired title to the lands, and the owner contended that the amendment of that sub-section by section 3 of chapter 32 of 8 & 9 Edward VII, which came into force on 19th May, 1909, required that the compensation should be ascertained as of the date of the acquisition of title by the Company, but the arbitrators refused to admit evidence of the value in 1912, considering that the second proviso in said amendment applied and that this "arbitration" had been pending at the time of the coming into force of that amendment.

*Held*, (CAMERON, J.A., dissenting), that the exception in said proviso did not apply, as the arbitration was not pending until after 19th May, 1909, that the arbitrators should, therefore, have ascertained the compensation as of the date of the award, and that the same should be set aside with costs.

*Per* CAMERON, J.A., dissenting. There was nothing done that was intended or could be taken as intended to abandon wholly the original notice of expropriation. There was only a substitution of a larger amount than that first offered. There was no order rescinding the first order appointing arbitrators, nor could such be made: *Chambers v. C. P. R.*, (1910) 20 M.R. 279, and the order of May, 1910, must be taken as only an exercise of the power of appointing an arbitrator in the place of one

who dies or refuses to act conferred by section 206 of the Act and should be treated as only an amendment of the first order. These arbitration proceedings, therefore, had their origin in the notice of expropriation of October, 1906, or, at the latest, when the owner refused the offer then made: *R. v. Manley-Smith*, (1893) 63 L.J.Q.B. 171, and the arbitration in this case, as that term is used in the amending statute of 1909, had its inception in the order appointing arbitrators made in January, 1907, so that the date fixed by the Act prior to the amendment of 1909 is the date as of which the compensation must be ascertained.

At the time of the passing of the statute relied upon, the Company had a vested right to have the compensation ascertained as of the earlier date, and that statute should be interpreted, if possible, so as not to take away any such right: *Hough v. Windus*, (1884) 12 Q.B.D. 237, per Bowen, L.J., and *Craies' Harbottle*, page 326, and the language used is not sufficiently clear and unambiguous to warrant the Court in saying that Parliament intended to take away that vested right in this case.

*Re Taylor and Canadian Northern Ry. Co.*.....268

2. *Agreement to refer to arbitration—Stay of proceedings—Arbitration Act, 1911, s. 6—Referee in Chambers, jurisdiction of—King's Bench Act, Rules 27 and 29.*—The plaintiffs contracted with the defendants to supply a turbine pump and other ma-

chinery for the equipment of a well. The contract provided that, "Should any question arise respecting the true construction or meaning of the specifications, or should any dispute arise from any cause whatever during the continuance of this contract, the same shall be referred to the award, order and determination of the City Engineer, whose award shall be binding and conclusive."

The plaintiffs claimed that they had supplied the machinery in accordance with the contract and sued for the amount payable under it and for many additional items in connection with the work.

Before pleading, the defendants moved under section 6 of the Arbitration Act, 1911, for a stay of proceedings pending a reference to the City Engineer as provided for in the contract. In answer to the motion the plaintiffs relied on the allegations in their statement of claim as showing reasons why the action should be allowed to proceed, but they filed no affidavits as evidence to show that anything not arising directly under the contract would have to be considered or that the City Engineer might have to be a witness, or that anything he might have to say, or even that any views he might have formed, would be contradicted by testimony of any kind, or that he would, for any cause, be considered disqualified to act as an arbitrator.

*Held*, reversing the decision of MACDONALD, J., that the proceedings should be stayed as asked for by the defendants. If

there was any reason why the matters should not be referred to arbitration, it was the duty of the plaintiffs to bring it forward and present it to the Judge.

*Bristol v. Aird*, [1913] A.C. 241, and *Hodgson v. Railway Passengers Assurance Co.*, (1882) 9 Q.B.D. at p. 191, followed.

The mere allegations in the statement of claim are not sufficient proof of the existence of such a reason.

The filing of a statement of defence was not necessary to the "arising" of a "question" or a "dispute" between the parties, especially as the defendants could only apply under the statute before pleading.

The expression, "should any dispute arise from any cause whatever during the continuance of this contract", is most comprehensive and should be read as meaning "all disputes that may arise between the parties in consequence of this contract having been entered into."

The completion of the work by the plaintiffs, as alleged, would not put an end to the contract, which would "continue" until all payments under it had been made, so that the disputes arose "during the continuance of the contract."

That the defendants' Engineer would naturally be biased in favor of the City is no sufficient reason for refusing to give effect to the express agreement of the plaintiffs who knowingly entered into it.

*In re Hohenzollern, &c.*, (1886) 54 L.T.N.S. at p. 597; *Willesford v. Watson*, (1873) L.R. 8 Ch. 473; *Ives v. Willans*, (1894) 63

*L.J. Ch. 521, and Jackson v. Barry Ry. Co.*, [1893] 1 Ch. 238, followed.

*Freeman & Sons v. Chester*, [1911] 1 K.B. 783, distinguished.

*Per* MACDONALD, J. The Referee had jurisdiction, under Rule 29 of the King's Bench Act, to make the order asked for.

*Northern Electric & Mfg. Co. v. City of Winnipeg*.....225

*See* CONTRACT, 3.

*See* INSURANCE ON LIVE STOCK.

### ARCHITECT.

*Liability of, to owner for negligence—Building contract making architect's certificate final and conclusive—Measure of damages—Quantum meruit.*—1. An architect employed by the owner to superintend the erection and completion of a building for him under the usual building contract, whereby the architect's certificates are made a condition precedent to the liability of the owner to make payments to the contractor and his final certificate of completion is necessary to entitle the contractor to payment of the full price of the work, and is made final and conclusive between the parties, may be liable to the owner for damages caused by the issue of such final certificate if, in fact, the building has not been properly completed according to the plans and specifications and it is shown that the architect, assuming that he was honest and desirous of being impartial, could not have given such certificate unless he had been negligent in discharging his duty of superintending the work for the owner and in making his final inspection of it.

*Badgley v. Dickson*, (1886) 13 A.R. 494; *Rogers v. James*, (1891) 8 T.L.R. 67, and *Saunders v. Broadstairs Local Board*, (1890) 2 Hudson on Building Contracts, 159, followed.

*Chambers v. Goldthorpe*, [1901] 1 K.B. 624, distinguished.

2. When, in such a case, the owner by the terms of the contract has no defence against the contractor's claim for the amount shown by the final certificate, the damages awarded to him against the architect should be the amount it would cost to put the building into the proper condition as called for by the plans and specifications.

3. The fact that the owner has succeeded in compromising with the contractor and getting a settlement with him for less than the amount called for by the final certificate, by reason of the imperfections in the work, does not affect his right to such damages against the architect, except that the amount saved by such compromise should be taken into account in favor of the architect.

4. Notwithstanding the negligence of the architect in such a case, he is nevertheless entitled to be paid for his services *quantum meruit* when he has been employed on the usual terms.

Judgment allowing plaintiff \$50 out of his claim for \$100, and costs of a mechanic's lien action for that amount, and allowing defendant on his counterclaim \$165.50 with costs. Set-off allowed, plaintiff to pay the difference.

*Bruce v. James*.....339

## ASSIGNMENT FOR BENEFIT OF CREDITORS.

See PARTNERSHIP, 2.

### ASSIGNMENT OF CHOSE IN ACTION.

*Set-off between debtor and assignee—Claim by debtor for damages against assignor—Action of deceit—King's Bench Act, R.S.M. 1902, c. 40, s. 39 (f), Rules 291, 293—Misrepresentation—Damages, measure of.*—This action was brought to recover the amount of a mortgage given by the defendant to M. and F. for the balance of the purchase money of a factory bought from them by defendant, which mortgage had been assigned to the plaintiff for valuable consideration. The plaintiff had no knowledge of any fraud on the part of M. & F. in making the sale to the defendant.

The trial Judge found as a fact that M. & F. had been guilty of such fraudulent misrepresentation as to material points inducing the sale that the defendant, though he could not have the sale rescinded because he had taken possession of, and operated, the factory for six months when it was destroyed by fire, yet had a right to recover against M. & F., made defendants by way of counter claim, damages as in an action of deceit to the extent of the difference between the price paid for the property and its real value.

The defendant also claimed that he had a right to set-off these damages against the plaintiff's claim, and counterclaimed for the amount against the plaintiff.

*Held*, that, as the claim of defendant for damages for deceit could not be pleaded either as a defence or set-off, but only by way of counterclaim, had the action been brought by M. & F., therefore subsection (f) of section 39 of the King's Bench Act, which makes an assignment of a chose in action subject to any defence or set-off in respect of the debt or chose in action \* \* \* "in the same manner and to the same extent as such defence or set-off would be effectual in case there had been no assignment," gave defendant no right to set it up as against the plaintiff.

Neither do Rules 291 and 293 of the King's Bench Act assist the defendant, for they apply only to a counterclaim against the original contractor, and not one against an assignee from him, and a claim for damages unconnected with the contract cannot be set off against the assignee.

*McManus v. Wilson*, (1908) 17 M.R. 567, and *Stoddart v. Union Trust, Ltd.*, [1912] 1 K.B. 181, followed.

The result would be the same if the plaintiff had been suing as assignee of the defendant's agreement to purchase instead of upon the mortgage given in pursuance of it.

*Stoddart v. Union Trust, Ltd.*, (*supra*)

Damages arising out of a breach of the contract assigned may be set off against a claim under the contract: *Young v. Kitchen*, (1878) 3 Ex. D. 127, *Newfoundland v. Newfoundland*, (1888) 13 A.C. 199.

*Semble*, If the defendant were in a position to repudiate the contract because of his vendors' fraud, he might set up the fraud by way of defence, even as against a *bona fide* assignee: *Stoddart v. Union Trust, Ltd.*, (*supra*).

*Cummings v. Johnson* . . . . 740  
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### **AUTHORITY TO AGENT.**

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### **BAILOR AND BAILEE.**

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### **BANKRUPTCY AND INSOLVENCY.**

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### **BILLS AND NOTES.**

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### **BY-LAW OF MUNICIPALITY.**

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### **BUILDING BY-LAW.**

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**COMMISSION OR PERCENTAGE.**

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**COMPANY.**

1. *By-law providing for lien on shares for debt to company—Transfer of shares—Purchaser without notice—Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, ss. 31, 44, 59—Assignments Act, R.S.M. 1902, c. 8, ss. 29, 31—Valuation of security by creditor filing claim with assignee—Estoppel—Abandonment.*—1. A company incorporated under the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, may, under sections 31 and 44, validly enact by-laws providing that the company shall have a lien upon his shares for all debts due or owing to it by any shareholder, whether or not the debt is presently due and payable, and for prohibiting the registration of a transfer of such shares except subject to such lien.

*Child v. Hudson's Bay Co.*, (1723) 2 P. Wms. 207; *Societe Canadienne Francaise v. Daveluy*, (1892) 20 S.C.R. 449, and *Lindley on Company Law*, vol. I., 637, followed.

2. A purchaser of such shares without notice of such by-laws or of any lien upon them, if he has in good faith paid the purchase money and procured a transfer from the shareholder, would probably not be bound by the by-laws and might perhaps insist on the transfer being recorded in the books of the company and the issue to him of a certificate free from any lien: *Masten on Company Law*, 161, and *McEdwards v. Ogilvie*, (1886) 4 M.R. 6.

3. But if the purchaser acquires knowledge of the by-laws and the lien claimed before the execution of the transfer and while he has still in his hands part of the purchase money to an amount exceeding the debt for which the lien is claimed, he cannot then insist upon the registration of the transfer to him free from such lien.

4. To entitle a purchaser of shares, as of other property, for value without notice, to priority over a prior equitable right, he must have acquired the legal title to the shares or, at all events, an absolute and unconditional right to be registered in respect of them without notice of the equitable title affecting the shares: *Lindley*, pp. 658, 659, and such an absolute and unconditional legal right cannot, under section 59 of the Act, be acquired by a purchaser of such shares until after the execution of the transfer to him and the actual surrender of the share certificate, when the latter states on its face that the shares are transferable only on the books of the Company upon the surrender of the certificate.

The shares in question were purchased by the plaintiff from the assignee for the benefit of the creditors of one Dunn who was indebted to the Company, and the Company filed its claim for the debt with the assignee without referring to or valuing the security held by it, viz., the lien on Dunn's shares, voted on the claim at meetings of Dunn's creditors, accepted a dividend on the claim as proved and, by its representative on the board of inspectors of the insolvent's estate, voted for the sale of the shares to the plaintiff.

*Held*, that, although section 29 of the Assignments Act provides that a creditor holding security shall put a valuation upon it, there is no provision in the Act for a forfeiture of either the security or the claim in case the creditor omits to state his security, and such omission, having been made by oversight only, could not be treated as an abandonment by the company of the security it held, or as estopping it from asserting the lien on the shares, in such a case as the present where it was still feasible to have the security valued under section 31 of the Act and the insolvent's estate administered without injustice to any one:

*Box v. Bird's Hill Sand Co.* 415

2. *Promoters' shares—Ultra vires—Illegality—Shareholders suing in name of company—Payment of dividends out of capital—Parties to action—King's Bench Act, Rule 345.*—The following acts and transactions on the part of the defendants, William Smith and his wife, the plaintiff Company

and other persons who had been shareholders and directors of the Company were held to be *ultra vires* of the Company, illegal and fraudulent as against the Company and its shareholders and declared void:—

1. The issue in 1905 of \$25,000 of fully paid-up stock, called series A, to the defendants and others, promoters of the Company, when nothing has been paid on the shares and the alleged consideration for the issue, viz.: "compensation for organizing the Company, costs of obtaining the charter, procuring amendments thereto and for all services and expenses of and incidental thereto," was found to be unsubstantial and illusory.

2. The issue at the same time to the same parties of certificates for \$25,000 of stock, called series B, showing payment of the first call of 15 per cent thereon without any actual payment in cash or otherwise to the Company by any of the parties.

3. The declaration of several large dividends on both series of stock in impairment of capital, and the application of those dividends by cross entries in the books of the Company from time to time so as to make it appear that successive calls of sixty per cent in all had been paid on their shares by the holders of series B stock, when in fact no money had ever been actually paid by them thereon, and the issue of certificates from time to time showing payment of such calls.

4. The declaration, in 1910, of a dividend of 20 per cent on the par value of the series A shares, \$25,000, and the payment of that

dividend to the defendant William Smith who was, and had been from the first, the president and manager of the Company and who had in the meantime acquired from the other promoters all their shares in both series, with full knowledge of all the circumstances.

5. A resolution of the directors passed in 1911 and confirmed at a meeting of shareholders, that the Company should pay out of its funds to William Smith \$9,000 in consideration of his surrendering and cancelling to the Company all the certificates for the 250 shares of series A fully paid up, of the par value of \$25,000, which he had acquired as above mentioned, and the payment to Smith of the said sum of \$9,000 in accordance with that resolution, because, (a) the shares of series A had not been validly issued and, (b) the transaction amounted to a purchase by the Company of its own shares, which was illegal and could not be ratified, sanctioned or authorized by the shareholders either by a majority or by the whole body acting in concert.

*Trevor v. Whitworth*, (1887) 12 A.C. 409; *Re Jones and Moore Electric Co.*, (1909) 18 M.R. 549; *Welton v. Saffery*, [1897] A.C. 299, and *North West Electric Co. v. Walsh*, (1898) 29 S.C.R. 46, followed.

The plaintiffs, Simpson and Halpenny, had become holders of shares of other series of stock in the Company in ignorance of the facts connected with the issue of the promotion stock, and sued in this action on behalf of themselves and all other shareholders of the Company. They had not

obtained the consent of the Company to the use of its name as plaintiff in the action, but the defendants had made no application before the trial to strike out the name of the Company as having been used without authority, nor did they at the trial offer any evidence to show which party, plaintiffs or defendants, really represented the majority of the shareholders.

*Held*, that the individual plaintiffs, being shareholders, had, *prima facie*, the legal right to use the Company's name to redress what were alleged to be wrongs to the Company and to the shareholders other than the defendants, which wrongs a majority could not sanction, and to have the transactions which were illegal, fraudulent and *ultra vires* of the Company set aside, and that the objection taken in the statement of defence as to the use of the Company's name as plaintiff should be over-ruled, as there could be no doubt that the proceedings taken were in the Company's interest.

If the objection had been taken before trial and given effect to, the only result, in the circumstances of this case, would be that the Company would have been made a party defendant under Rule 345 of the King's Bench Act, and the action would have gone on at the suit of the individual plaintiffs.

*Dicta* of Wigram, V.C., in *Foss v. Harbottle*, (1842) 2 Hare, at 491; Jessel, M.R., in *Russell v. Wakefield*, (1875) L.R. 20 Eq. at page 482, and of Malins, V.C., in *Gray v. Lewis*, (1869) L.R. 8 Eq. at p. 541; *Pender v. Lushington*,

(1877) 6 Ch. D. 70, and *Harben v. Phillips*, (1883) 23 Ch. D. 14, followed.

Judgment in accordance with the above holdings, setting aside the issue of series A stock as void *ab initio*, declaring that the shares in series B are wholly unpaid and that the holders thereof have no right to vote thereon at meetings of shareholders, as the calls thereon had not been paid, and should be enjoined from so voting while in default in payment of calls; rectifying the share register in accordance with the judgment, and requiring the defendants to repay to the Company all dividends paid to them or either of them upon series A or B stock with interest, and the defendant William Smith to repay to the Company the \$9,000 received by him for the surrender of the promotion stock, with interest.

Defendants were also enjoined from disposing of or transferring any of said series B stock until all calls were paid.

Defendants to pay all costs with removal, if necessary, of the statutory limitation fixed by 7 & 8 Edw. VII, c. 12, s. 1.

Reference to the Master to ascertain what moneys had been received by the defendants or either of them in respect of the series B stock.

Further directions and costs of the reference reserved.

*Colonial Assur. Co. v. Smith* 243

3. Directors buying shares from other shareholders—Fraud—Concealment of material fact affecting value of shares—Ownership of shares—Voidable transaction—Amendment—Ratification.]-The

defendants and another director of a company, formed to acquire and sell a single tract of land, were appointed by the directors a committee "to bring in a proposal for disposing of the lands and shares". This committee negotiated a sale at a price which made the shares worth about \$2,000 each. Whereupon the defendants proceeded to purchase the shares held by the plaintiff and others at \$1,370 per share without disclosing the advantageous sale they had made, and the plaintiff sold and transferred his shares to the defendants in ignorance of such sale.

*Held*, that the position of the members of the committee was very different from that of ordinary directors of a company as regards their fiduciary relations to the shareholders, and that they were bound to inform the shareholders about the sale if they proposed to buy their shares from them, and that the defendants had been guilty of such fraudulent concealment as to make their purchase from the plaintiff voidable.

*Walsham v. Stainton*, (1863) 1 De G. J. & S. 678; *Hyatt v. Allen*, (1912) 8 D.L.R. 79, and *Re Imperial Land Co.*, (1876) 4 Ch. D., 566, followed.

*Percival v. Wright*, [1902] 2 Ch. 421. distinguished.

This was an issue directed in the winding-up of the company to try the question of the ownership of the shares in dispute and it was contended that, as the sale had been completed and the shares transferred, and the sale was complete, even if the sale was fraudulent, it was not voidable, and the

ship was still in the transferees, and the issue must be decided in their favor.

*Held*, that the form of the issue should be amended, if necessary, to enable the Court to enter a verdict that the shares were the property of the plaintiff subject to his liability to account for what he had received for them.

*Held*, also, that the evidence failed to show that the plaintiff had elected to affirm the transaction after he became aware of the fraud.

*Gadsden v. Bennetto and Wellband*.....33

4. *Allotment of shares—Action for calls—Fraud—Misrepresentation—Evidence—Corroboration—By-laws of company—Resolution of directors, proof of—Acceptance of application for shares—Notice of allotment—Application under seal.*—1. The facts constituting fraud or misrepresentation must be clearly and conclusively established; and, although the plaintiff swears positively to the misrepresentation alleged, yet, if the defendant positively denies it, and there is no reason to attach a superior degree of credit to the plaintiff's testimony, he must fail in the absence of something to corroborate it; *Kerr on Fraud*, pp. 449, 450 and 458.

2. Statements by the promoter of a company as to the amount of business expected to be done, although not justified by the results, may merely amount to favorable commendation to induce a prospective purchaser to take shares and, unless made in bad faith, will not be sufficient to

enable the latter to avoid his contract thereby induced.

One of the by-laws of the plaintiff company provided that the directors, three in number, might increase their number to seven at any time "by resolution to be ratified by the shareholders in meeting". The evidence showed that at a meeting of the directors held on 12th March, 1910, they passed such a resolution, but the minutes of the meeting contained no reference to it. Subsequently, at a meeting of the shareholders, a resolution was passed "that the board of directors be increased from three to seven members, an amendment to the by-laws being put and carried to that effect."

*Held*, that the passing of the resolution of the directors to increase their number might be proved by the oath of one or more of them, and that the new board of seven directors was properly constituted, and a call upon the shares made by them was legal and binding.

*Colonial Assurance Co. v. Smith*, (1912) 22 M.R. 441, distinguished.

After sending in his application for shares and making the first payment the defendant sent a letter enclosing his cheque for \$200 in payment of the second instalment due according to the terms of his application, and the Company wrote him a letter acknowledging receipt.

*Held*, that, even if the defendant had not received notice of the allotment of his shares, there was a sufficient intimation of the Company's acceptance of his application to bind him.



*Seuble*, The fact that the defendant's application was under seal would not bind him in the absence of the Company doing something to indicate its acceptance and communication of such acceptance to him.

*Nelson Coke and Gas Co. v. Pellatt*, 4 O.L.R. 481, distinguished.

*North West Battery, Ltd. v. Hargrave*.....923

5. *Liability for services of promoter — Managing director — Liability of co-promoters—By-law of company — Ratification—Contract.*—1. A company promoter cannot recover from the company anything for his services rendered or moneys expended in organizing the company unless the Act of incorporation makes provision for payment of such expenses, or unless the company after its incorporation agrees with him to make such payment; nor is a company bound in equity to pay the preliminary expenses because it has adopted and derived benefit from services previous to its incorporation: 5 *Halsbury*, 50.

*In re National Motor &c. Co.*, [1908] 2 Ch. 515, followed.

2. In the absence of an express contract, one of several promoters of a company cannot sue another for remuneration for promoting services or for contribution thereto.

*Holmes v. Higgins*, (1822) 1 B. & C. 74, followed.

3. A company cannot be liable to its managing director for wrongful dismissal or breach of contract, if no agreement for his services was ever concluded between them.

4. A company cannot ratify a contract which was made by its promoters when the company was not in existence: *In re Empress Engineering Co.*, (1880) 16 Ch. D. 125.

5. A person who acts as manager of a company is entitled to payment from the company for his services during the time that he acted as such, notwithstanding that he was also a director of the company and there was no by-law of the company authorizing his employment.

*Albion v. Martin*, (1875) 1 Ch. D. 580, and *Birney v. Toronto Milk Co.*, (1902) 5 O.L.R. 1, distinguished, the latter on the ground of a difference in the statutes applicable.

*Van Hummell v. International Guarantee Co.*.....103

See TRESPASS.

See WINDING-UP OF COMPANY.

## COMPENSATION FOR LANDS TAKEN.

See ARBITRATION AND AWARD, 1.

## CONDITION.

See INSURANCE ON LIVE STOCK.

## CONSIDERATION

See STATUTE OF FRAUDS.

## CONSPIRACY.

See DEMURRER.

See JURY TRIAL, 4.

## CONSTITUTIONAL LAW.

See WINDING-UP OF COMPANY, 1.

## CONSTRUCTION OF CONTRACT.

See CONTRACT.

See GUARANTY.

See INSURANCE ON LIVE STOCK.

See VENDOR AND PURCHASER, 4.

## CONSTRUCTION OF COVENANT.

See LANDLORD AND TENANT, 1.

## CONTEMPT OF COURT.

See CRIMINAL LAW.

See PRACTICE, 3.

## CONTRACT

1. *Construction of contract—Acceptance of offer—Agency—Extension of time of sole agency—Injunction—Ambiguity.*—Action for injunction to prevent the defendants from violating their contract giving plaintiffs the sole agency in Canada and the United States for the sale of "Halsbury's Laws of England." The principal question to be decided was whether the agency had expired by effluxion of the stipulated time.

In a memorandum submitted by defendants, but not signed by them, they had offered to give the sole agency for five years from publication of volume 1, which was in November, 1907, or for one year after publication of the last volume of the set, whichever should be the longest period.

Plaintiffs wrote in reply to this, stipulating, among other things, for the sole agency "for five years from the date of

publication." Defendants cabled their acceptance of plaintiffs' modified terms and on 14th June, 1907, wrote plaintiffs a letter confirming the cable message, but adding "The terms between us are now as set out overleaf."

*Held*, that the expression "date of publication," without more, was ambiguous and might refer either to the first volume or the last.

In the "overleaf" it was mentioned that the sole agency was to be for five years from the date of publication of volume I. A large number of sets of the work had been sold by the plaintiffs under their agency during the intervening five years.

*Held*, 1. The fact that Mr. Cromarty, the general manager of the plaintiffs, had not seen the defendants' letter of 14th June, 1907, or the "overleaf" terms, owing to his absence, was no excuse for the plaintiffs' conduct, the defendants having no knowledge of that fact, and the plaintiffs must be held to have had knowledge of the contents of the letter and to have accepted the defendants' terms as stated therein.

2. If there was no acceptance in fact of the "overleaf terms" by the plaintiffs, then there was no *consensus* between the parties and the plaintiffs had not proved the contract upon which they relied.

3. The cablegram sent by the defendants unsigned saying, "Agree your modified terms, writing," was not an unqualified acceptance of the plaintiffs' terms and the letter following must be

read with it, more especially as nothing had been done, nor had the plaintiffs' position been altered in any respect, between the receipt of the cablegram and that of the letter.

4. The plaintiffs had failed to establish a contract entitling them to the sole agency beyond November, 1912, and their action should be dismissed with costs.

*Canada Law Book Co. v. Butterworth* . . . . . 352

[Affirmed by Privy Council, 26 W.L.R. 937.]

2. *Construction of contract—Vendor and purchaser—Agreement to pay interest—Rectification of Agreement—Laches.*—The defendant, in October, 1908, owning a house subject to a mortgage for \$4,000 bearing interest at  $7\frac{1}{2}$  per cent. per annum, upon the principal of which \$200 per year might be paid off, signed an agreement of sale of same to the plaintiff for the sum of \$9,500 payable as follows: \$5,500 part of said principal sum payable as follows:—\$500 in cash, \$500 on 1st November, 1908, and further instalments at half yearly and yearly intervals, the last of them on 1st November, 1912, "together with interest at the rate of seven per cent. per annum on all payments as from time to time remaining unpaid until payment, with interest payable on the 1st November, commencing November 1st, 1909. And the balance of \$4,000 by the assumption, on the completion of the said payments, of a mortgage of \$4,000 bearing interest at the rate of seven per cent. per annum. The payment of \$200 yearly by the vendor on

said mortgage shall be taken into consideration by the purchaser at the time of assuming mortgage."

Following this there was a printed covenant by the purchaser that he would "well and truly pay or cause to be paid to the said vendor the said sum of money, together with the interest thereon at the rate aforesaid on the days and times and in manner above mentioned."

There was also a specially inserted provision at the end of the agreement in these words.

"Provided further that the purchaser shall have the privilege of paying off the whole or any part of the vendor's equity remaining unpaid at any time, without notice or bonus, by paying interest up to date of such payment."

*Held*, reversing the decision of the trial Judge, that, upon the proper construction of the instrument, the purchaser was not required to pay the interest accruing on the mortgage for \$4,000 prior to the time of payment of the last instalment of the \$5,500 and was entitled, on payment of that sum in full and all interest thereon, to a conveyance of the property subject only to the principal of the mortgage for \$4,000 and interest accruing thereon after such payment.

When the plaintiff made the payment due 1st November, 1909, she claimed that she had to pay interest only on the unpaid portion of the \$5,500 and made her payment accordingly, and so for all the subsequent instalments down to the 1st November, 1912, whilst the de-

fendant, on receiving each payment, claimed that, from the beginning, the plaintiff had also to pay interest at 7 per cent on the \$4,000 mortgage, and that he received the several payments only on account.

The defendant had never made any attempt to have the agreement rectified, nor did he in his statement of defence, ask for such rectification, although he asked for it at the trial.

*Held*, that no clear case for rectification had been made out, and such should not be ordered after so great a lapse of time after the defendant became aware of the position taken by the plaintiff.

*Miner v. Hinch* ..... 802

3. *Construction of contract—Agreement to submit differences to arbitration—Stay of proceedings—Arbitration Act, 1911, s. 6.*—The defendants had a contract with the City of Winnipeg to furnish and instal certain machinery for a well. That contract contained a clause providing for the arbitration of any disputes or differences between the parties arising from any cause whatever during the continuance of it, and this Court decided in *Northern Electric Co. v. Winnipeg*, (1913) 23 M.R. 225, that the City of Winnipeg was entitled, under section 6 of The Arbitration Act, 1911, to a stay of proceedings in an action brought against it by the present defendants to settle disputes arising out of the contract.

This action was brought under a contract whereby the plaintiffs

agreed with the defendants, upon their supplying a motor and switchboard, to practically perform the contract between the defendants and the City above referred to, and the defendants, contending that their contract with the plaintiffs provided for submission of any disputes to arbitration, applied for a similar order staying proceedings.

The clauses relied on were, in effect, that the plaintiffs agreed to do all work in accordance with and carry on all undertakings, as called for in the specifications of the City of Winnipeg thereto attached and "General Conditions" of the defendants' contract with the City also attached, and that, if any question should arise "respecting the true construction or meaning of the specifications," the same should be referred to the City Engineer of the City of Winnipeg "whose award shall be final and conclusive."

Clause 15 of the "General Conditions" above referred to provided that the work was to be executed to the satisfaction of the City Engineer and that he was to be "sole judge and arbitrator as to the mode in which the work is to be carried out . . . and also of every other matter or thing incident to, bearing upon, or arising out of . . . the contract".

The provision for a submission to arbitration contained in the defendants' contract with the City was independent of said Clause 15 and was in no way incorporated into or made part of the contract sued on.

The matters in dispute in this action did not relate to "the true construction or meaning of the specifications", the claim being to recover a small balance, alleged to be unpaid, of the contract price and damages for the same delays and defaults as charged against the defendants by the City in the other action.

*Held*, that there was nothing in the contract in question providing for a submission to arbitration of the matters in dispute and that the defendants were not entitled to a stay of proceedings, although the result would be that they would be compelled to litigate the same matters before two different tribunals—the arbitrator in one case, and by a trial in Court in the ordinary way in the other, possibly with different results.

*Per* CAMERON, J.A., Even if clause 15 of the "General Conditions" in the defendants' contract with the City could be interpreted as an agreement for a submission to arbitration as between the defendants and the City, it was quite inapplicable to, and, therefore, not part of, the agreement between the parties to this action.

*Watson Stillman Co. v. Northern Electric Co.*..... 912

*See* COMPANY, 5.

*See* VENDOR AND PURCHASER, 4, 10.

## **CONTRIBUTION.**

*See* GUARANTY.

## **CONTRIBUTORY NEGLIGENCE.**

*See* RAILWAYS.

## **CONVERSION.**

*See* PLEADING.

## **CONVEYANCE ABSOLUTE IN FORM GIVEN AS SECURITY.**

*See* REGISTERED JUDGMENT.

## **CORPORATION.**

*See* LANDLORD AND TENANT, 3.

## **CORROBORATION.**

*See* COMPANY, 3, 5.

## **COSTS.**

1. *Counterclaim* — 7 & 8 *Edw. VII*, c. 12, s. 1.]—When there is a claim and a counterclaim, the counterclaim is to be regarded, for the purposes of the taxation of costs, as a separate action: *Les Soeurs v. Forrest*, 20 M.R. 301.

In taxing the costs of a counterclaim, when the defendant has succeeded in respect of both the claim and the counterclaim, he should receive not only his costs of opposing the plaintiff's claim, but also such additional costs as were incurred by reason of the counterclaim: *Saner v. Bilton*, (1879) 11 Ch. D. 416; *Atlas v. Miller*, [1898] 2 Q.B. 500, and *Fox v. Central Silkstone Co.*, [1912] 2 K.B. 597.

*Held*, that in this case the discretion of the taxing officer in allowing counsel fees of \$190 in respect of the counterclaim should not be interfered with.

*Per* *Perdue*, J.A. In taxing the costs of a counterclaim the taxing officer should not take into account the fact that there has been a reduction of the defendant's taxable costs of defending the plaintiff's action by

reason of the statutory limit fixed by section 1 of chapter 12 of 7 & 8 Edw. VII.

*Cox v. Canadian Bank of Commerce*..... 25

2. *Discovery—Examination of past officer of plaintiff corporation—Unnecessary proceeding.*—The defendants obtained discovery in the course of the action by examining the plaintiffs' engineer, as an officer, and by the plaintiffs' affidavit on production. In addition, they examined, out of the jurisdiction, R., a past officer of the plaintiffs, and afterwards called him as a witness at the trial. No part of his examination for discovery was used at the trial, nor did the defendants apply for leave to use it.

*Held*, that defendants' application for a fiat to tax against the plaintiffs the costs of examining R. for discovery, should be refused.

*City of Winnipeg v. Winnipeg Elec. Ry. Co.*..... 533

See COUNTY COURTS, 2.

See FI. FA. GOODS.

See HIGHWAYS.

See PARTIES TO ACTION, 1.

See PARTNERSHIP, 1, 3.

See PRACTICE, 3.

See PRINCIPAL AND AGENT, 5.

See SECURITY FOR COSTS.

See SOLICITOR AND CLIENT.

See THRESHER'S LIEN.

## COUNTERCLAIM.

See COSTS, 1.

See EVIDENCE.

See PRACTICE, 6.

See REAL PROPERTY ACT, 2.

See STAYING PROCEEDINGS.

## COUNTY COURT

1. *Practice in County Court—Discontinuance—County Courts Act, R.S.M. 1902, c. 38, s. 72—Judgment—Discharge of—Transfer of action to King's Bench—Void proceeding—King's Bench Act, s. 90, Rule 538—Partnership Act, R.S.M. 1902, c. 129, s. 26—Charge on interest of one partner in partnership to secure payment of judgment—Irregularity—Notice of motion instead of summons.*—

1. The County Courts Act, R.S.M. 1902, c. 38, contains no provision whereby a plaintiff can discontinue his action as to one of two defendants; and, even if the practice in the King's Bench in cases not expressly provided for in the County Courts Act can be adopted and applied under section 72 of that Act, a plaintiff cannot discontinue as to one defendant after judgment against two, as Rule 538 of the King's Bench Act only permits the filing of a discontinuance before notice of trial is served.

2. A discontinuance, even if properly filed, has not the effect of discharging the party from his liability, and, therefore, has not the effect of discharging a judgment against any other defendant.

3. Section 90 of the King's Bench Act, R.S.M. 1902, c. 40, only permits the transfer of an action from the County Court to the Court of King's Bench before trial and "when the defence or counterclaim of the defendant involves matters beyond the jurisdiction of the (County) Court," so that an

order of a County Court Judge for such transfer of an action in which the plaintiff has final judgment against two defendants, and in which there had been no defence or counterclaim, is entirely without jurisdiction and is a mere nullity, although it might be well to formally rescind the order so as to restore the action to its former status in the County Court.

*McLeod v. Noble*, (1897) 28 O.R. 528, and *Brooks v. Hodgkinson*, (1859) 4 H. & N. 712, followed.

4. Although, therefore, a plaintiff has filed such a discontinuance and obtained and acted upon such an order of transfer of his action in which he had judgment against two defendants, his judgment is still valid and subsisting and sufficient to found an application under section 26 of the Partnership Act, R.S.M. 1902, c. 129, for an order charging the interest of one of the judgment debtors in a partnership of which he is a member with the payment of the judgment debt.

5. Although section 26 of the Partnership Act provides for an application "by summons," yet, if the plaintiff has given notice of motion instead, and the defendant appears, the irregularity may be disregarded and the motion dealt with as if a summons had in the first instance been formally granted.

*McInnes v. Nordquist*.... 815

2. *Jurisdiction of Judge—County Courts Act, R.S.M. 1902, c. 38, s. 330—Reversal of judgment—Ex parte application—Objections not raised at trial—Costs.*]

—The defendants in this action had sued Wallace, the plaintiff in this action, and K. Smith and E. Smith, in the County Court.

The record of the County Court proceedings contained the following entries:

"July 26, 1911. Trial and judgment for plaintiff against defendant K. Smith for \$491.25 debt, together with \$. . . . costs. Action dismissed as to other defendants.

"Aug. 5, 1911. Affidavit of intention to appeal.

"Aug. 19, 1911. Paid as security for costs, \$25.00.

"Aug. 22, 1911. Trial and judgment for plaintiffs for \$496.35 debt, together with \$47.45 costs.

"Aug. 24, 1911. Certificate of judgment."

On the strength of the entry of August 22, 1911, the defendants took out and registered a certificate showing a judgment in their favor for \$496.35 and costs against Wallace and the two Smiths. Wallace then brought this action claiming that the said certificate of judgment should be declared void and its registration vacated.

There was no evidence at the trial except what was of a formal character, and the facts of what took place before the County Court Judge after 26th July, 1911, were not put in evidence. It was, however, set up by Lindsay that, on an *ex parte* application made by him to the Judge of which no notice had been given to Wallace or his solicitor, the Judge had caused the judgment of August 22nd, 1911, to be entered.

*Held*, reversing the decision of

Metcalf, J., that, under the circumstances, the Court must assume that the County Court Judge would not, after entering a judgment in favor of two of the parties, in their absence and without notice to them, set aside that judgment and enter a judgment against them, and that, in that view, the entry of August 22, 1911, did not necessarily mean more than the rectification of a clerical error in the entry of judgment by slightly increasing the amount against K. Smith, especially as the entry was silent as to the person or persons against whom the judgment was given, and was, therefore, insufficient to warrant the issuing of the certificate of judgment against Wallace, which should be declared void and its registration vacated, with costs of the action.

No costs of the appeal were allowed, because the plaintiff did not, at the trial, raise the point upon which his appeal succeeded.

*Wallace v. Lindsay* . . . . . 553

### **CREDITOR HOLDING SECURITY.**

*See* COMPANY.

### **CRIMINAL LAW.**

*Trial—Postponement — Publication in newspaper of alleged confession of accused person—Contempt of Court.*—The publication, in newspapers circulating largely in the City where the assizes are being held, of news matter with display headings stating that a person accused of murder, for which he is to be tried at that assize, has confessed his guilt to a police officer is good cause

for postponing the trial to the next assizes, as it is calculated to prejudice the minds of the jurymen there assembled against the prisoner, and to prevent him from having a fair trial. Moreover, evidence of the alleged confession might not be allowed to be given at the trial.

Such a publication anticipates the course of justice and might be treated as a contempt of Court, because its tendency is to deprive the Court of the power of administering justice duly, impartially and with reference solely to the facts judicially brought before it.

*The King v. Davies*, [1906] 1 K.B., 32, followed.

*Rex v. Willis and Pople* . . . 77

*See* PROHIBITION.

### **CY-PRES DOCTRINE.**

*See* VENDOR AND PURCHASER, 5.

### **DAMAGES.**

*See* ASSIGNMENT OF CHOSE IN ACTION.

*See* EXECUTORS AND ADMINISTRATORS.

*See* JURY TRIAL, 1, 2.

*See* LANDLORD AND TENANT, 2.

*See* MUNICIPALITY, 2, 3.

*See* NEGLIGENCE, 1, 2.

*See* RAILWAYS, 3.

*See* VENDOR AND PURCHASER, 5.

### **DEFECT IN SYSTEM.**

*See* NEGLIGENCE, 3.

*See* RAILWAYS, 4.



## DELEGATION OF AUTHORITY.

See LANDLORD AND TENANT, 3.

## DEMURRER.

*Argument of, before trial—King's Bench Act, Rule 453—Charge of conspiracy—Public officer—Liability of, for acts done in discharge of his duties as such.*—The statement of claim charged, amongst other matters, that the defendants, including Johnston, the Chief License Inspector for the Province, had conspired together to deprive the plaintiff of the benefit of his application for a license under the Liquor License Act, and of the moneys paid by him in respect thereof, and that Johnston had connived at, and assisted his co-defendants in wrongfully procuring the issue of a license to the defendant Company under the plaintiff's application and in taking the benefit of the plaintiff's application and of money paid by him in respect thereof.

The defendant Johnston demurred on the grounds:

(a) That he had no power to procure such license.

(b) That no legal liability is imposed on him in the discharge of his duties as Chief License Inspector.

*Held*, that the complaints against Johnston raised issues of fact, not of law, that the special grounds of his demurrer were not supported by the pleadings, and that his application for an order, under Rule 453 of the King's Bench Act, providing for the determining of questions of law before the trial of the action, should be dismissed with costs.

*Gardiner v. Bickley*, (1905) 15 M.R. 354, followed.

*Arenowsky v. Veitch* ..... 755

See ELECTION PETITION, 4.

## DESCRIPTION OF LAND.

See VENDOR AND PURCHASER, 10.

## DETINUE.

See PLEADING.

## DIRECTORY OR IMPER- ATIVE REQUIREMENTS OF STATUTES.

See LOCAL OPTION BY-LAW, 2.

## DISCONTINUANCE.

See COUNTY COURT, 1.

## DISCOVERY.

See COSTS, 2.

See EXAMINATION FOR  
DISCOVERY.

## DISCRETION.

See LIQUOR LICENSE ACT.

## DISCRETIONARY ORDER

See PRACTICE, 3.

## DRAINAGE.

See MUNICIPALITY, 3.

## ELECTION OF FORUM.

See JURY TRIAL, 3.

## ELECTION PETITION.

1. *Manitoba Controverted Elections Act*, R.S.M. 1902, c. 34, ss. 33, 34, 35—*Extension of time for service of petition—Substituted service—Powers of Judge—Appeal—Judge rescinding his own ex parte order.*—*Held*, (RICHARDS and HAGGART, JJ.A., dissenting) that,

under sections 33 and 34 of the Manitoba Controverted Elections Act, R.S.M. 1902, c. 34, a Judge has power, in a proper case, to make successive orders extending the time for service of an election petition, and that, under section 35 of the Act, an order for substituted service may, on good cause being shown, be made after the expiration of the time allowed by any order extending the time for personal service.

*Held*, also,

1. An appeal to the Court of Appeal lies from any interlocutory order made by a Judge in the matter of an election petition under the Act.

*Re Shoal Lake Election*, (1887) 5 M.R. 57, followed.

2. *Per* PERDUE and CAMERON JJ.A., (RICHARDS and HAGGART, JJ.A., dissenting) that a Judge has no power to rescind his own order made upon an interlocutory application in an election petition although made *ex parte*.

*Re Gimli Election* (No. 1). . 678

2. *Manitoba Controverted Elections Act*, R.S.M. 1902, c. 34, s. 37—*Extension of time for filing preliminary objections—Successive orders to extend time—Manitoba Interpretation Act*, R.S.M. 1902, c. 89, s. 8 (m).—Under section 37 of the Manitoba Controverted Elections Act, R.S.M. 1902, c. 34, a Judge has power, if he sees fit, to make more than one order to extend the time for the respondent to file preliminary objections to an election petition.

So held by PERDUE, CAMERON and HAGGART, JJ.A., following *Payne v. Deakle*, (1809) 1 Taunt.

509, and distinguishing *Power v. Griffin*, (1902) 33 S.C.R. 39.

HOWELL, C.J.M., and RICHARDS, J.A., dissented, following *Power v. Griffin*, *supra*.

*Per* CAMERON, J.A., Paragraph (m) of section 8 of the Manitoba Interpretation Act, R.S.M. 1902, c. 89, which says that "words importing the singular number . . .

. . . only include more persons, parties or things of the same kind than one", would justify the interpretation of the word "time" in section 37 as if it meant "time (or times)."

*Re Gimli Election*. (No. 2) 851

3. *Manitoba Controverted Elections Act*, R.S.M. 1902, c. 34—*Judgment on interlocutory application—Leave to appeal to Privy Council*.—As the Judicial Committee of the Privy Council has, in *Theberge v. Laudry*, (1876) 2 A.C. 107, *Valin v. Langlois*, (1879) 5 A.C. 115, *Kennedy v. Purcell*, (1888) 4 T.L.R. 664, and *Moses v. Parker*, [1896] A.C. 245, plainly decided that, except possibly on the question whether an Act is *ultra vires* of the Legislature, the Royal prerogative to hear an appeal does not extend to cases under Controverted Elections Acts, and that, even if it did so extend, they would not advise its exercise, except perhaps in the case of an appeal on that question of *ultra vires*, leave to appeal to the Privy Council, from a decision of the Court of Appeal in an interlocutory matter in connection with proceedings on a petition under the Manitoba Controverted Elections Act, R.S.M. 1902, c. 34, should not be granted by the Court, especially when no

such question of *ultra vires* has been raised.

*Re Gimli Election. (No. 3) .863*

4. *Preliminary objections—Status of petitioner—Proof of his right to vote—R.S.C. 1906, c. 6, ss. 14, 18, 269—Misnomer—Identity—Pleading—R.S.C. 1906, c. 7, ss. 6, 11, 12, 17, 18, 19—Affidavit—Service of petition—Waiver—Notice of presentation of petition—Demurrer—Intimidation—Freedom of election.*—Hearing of preliminary objections to an election petition filed under the Dominion Controverted Elections Act, R.S.C. 1906, c. 7.

The following points were decided:

(1) The status of the petitioners and their right to vote at the election in question were sufficiently proved by the production of a copy of the original list of voters bearing the imprint of the King's Printer: R.S.C. 1906, c. 6, ss. 14, 18.

*Re Provencher Election, (1901) 13 M.R. 444, and Re Provencher Election, (1912) 22 M.R. at p. 22, followed.*

(2) The transposition in the printed list of the given name of one of the petitioners was a matter of no importance, as his identity was proved by his own evidence.

(3) The precise words of complaint prescribed by section 11 of The Dominion Controverted Elections Act need not be used in the petition if the words used convey the same meaning.

(4) An objection that the affidavit of the petitioner required by section 6 was sworn to some

days before the filing of the petition is of no force.

(5) The evidence of the service of the petition, the notice of the security given and the notice of presentation was ample to show that sections 17 and 18 of the Act had been fully complied with; but, if not, the respondent, by filing preliminary objections, which he could do, under section 19, only within five days after the service of the petition upon him, and by filing a cross petition, which he could do under subsection 2 of section 12 only within fifteen days after service of the petition, should be held to have waived any irregularities in the service.

(6) It is proper to dispose of a question as to the sufficiency in law of allegations in the petition on the hearing of preliminary objections.

*Re Lisgar Election, (1906) 16 M.R. 249, followed.*

(7) An allegation that, by the arrest of certain persons and the communication of certain threats and statements, electors entitled to vote at the election were intimidated and frightened and prevented from soliciting votes for R. at the election and from advocating his candidature, and refrained from so doing and from casting their votes at said election, is good in law, in view of the very wide and inclusive provisions of section 269 of the Dominion Elections Act, and because, independently of any statute, freedom of election is, at Common Law, essential to the validity of an election.

*North Louth Case, (1911) 6 O'M.*

and H. at p. 172, and *South Meath Case*, (1892) 4 O'M. and H. 142, followed.

*Re Macdonald Election* . . . 542

## EMPLOYER AND EMPLOYEE.

*Injury to workman—Liability of employer for—Duty to provide proper and safe appliances to work with—Common employment—Volenti non fit injuria.*]

—The infant plaintiff, a boy of sixteen years, in the employ of the defendant company, was, in obedience to the directions of one of the plumbers employed by the company, holding a chisel in a vertical position over a concrete floor, his head being nearly on a level with the top of the chisel, whilst a laborer temporarily taking the place of the plumber was driving the chisel into the concrete by successive blows of a sledge hammer upon the top of the chisel in order to break into the concrete.

At one of these blows the plaintiff was struck in the eye by a steel splinter from the head of the chisel and lost his eye in consequence.

An examination of the chisel showed that its head was much battered and broken up, evidently by long continued beating upon it with a sledge hammer, and its appearance was such as to suggest the probability of splinters being knocked off by any blow of the hammer.

The chisel was one which had been borrowed by the plumber, who had to provide his own tools to work with.

*Held*, 1. That it is the duty of the employer at Common Law to provide proper appliances for his

workman to work with and to maintain them in a proper condition: *Smith v. Baker*, [1891] A.C., per Lord Herschell at p. 362, that, if by reason of a breach of that duty a workman suffers injury, the employer is *prima facie* liable: *Williams v. Birmingham*, [1899] 2 Q.B. 338, and that proper appliances in a proper condition had not been provided in this case.

2. As between the defendants and the plaintiff, it was no defence that the defendants did not supply the defective chisel but left the plumber to provide it.

*Jones v. Burford*, (1884) 1 T.L.R. 137, distinguished.

3. As the plaintiff had never been put to that kind of work before, and did not know the dangerous character of it, the maxim "*volenti non fit injuria*" could not be applied to the circumstances of this case.

*Per Haggart, J.A.*, dissenting. The utmost that could be said of the use of the defective chisel was that it was a specific act of negligence on the part of a fellow workman, causing an injury to another in the common employment of the defendant company, but giving rise to no right of action at Common Law.

*Hastings v. Le Roi* (No. 2), (1903) 34 S.C.R. 177, followed.

Even if the manager of the company, Bearisto, who looked after all the defendants' work, saw that it was carried out and employed all the men that worked for the company, had actual knowledge of, approved of, adopted and ratified what the plumber was doing in that particular work, that would not be binding on the

company, as, whatever his powers and duties might be, he was, as manager, only a fellow workman with the humblest laborer or apprentice in the employ of the company, although he might be in practical control of the company and own ninety per cent or more of its capital stock.

*Wilson v. Merry*, (1868) L.R. 1 H.L.Sc. at p. 334; *Howells v. Landore, &c. Co.*, (1874) L.R. 10 Q.B. at p. 64, and *Matthews v. Hamilton Powder Co.*, (1887) 14 A.R. 261, followed.

*Hooper v. Bearisto Plumbing Co.* ..... 712

See NEGLIGENCE, 3.

### **EQUITABLE RELIEF.**

See VENDOR AND PURCHASER, 4.

### **ESTOPPEL.**

See COMPANY, 1.

See GUARANTY.

See HIGHWAYS.

See LANDLORD AND TENANT, 3.

### **EVIDENCE.**

*Collateral verbal agreement—Cheque on Bank—Counterclaim.*—Plaintiffs' testator, in negotiating the sale of his property to a syndicate of which the defendant was one, promised to pay him \$1,800 for his services in organizing the syndicate if the sale should be completed for the sum agreed on. The syndicate of five members was formed by defendant and all joined in the mortgage given for part of the purchase money, but the property was transferred to the defendant alone. On closing the purchase, the defendant handed over two

cheques, one for \$1,800 and the other for the balance of the cash payment, at the same time asking the deceased to indorse the \$1,800 cheque back to him. The deceased said, "I will see you later," but failed to return the cheque. Defendant, becoming suspicious, stopped payment of it.

*Held*, (1) That parol evidence was admissible to prove the agreement by deceased to pay the \$1,800, since it was not evidence to contradict or vary any written document.

(2) That, while plaintiffs were entitled to judgment on the cheque, the defendant must succeed on his counterclaim for a like amount, as his evidence was sufficiently corroborated.

No costs to either party.

*Benson v. Hutchings*..... 530

See COMPANY, 4.

See GUARANTY.

See NEGLIGENCE, 1, 2.

See PRINCIPAL AND AGENT, 4.

See STATUTE OF FRAUDS.

See VENDOR AND PURCHASER, 10.

See WARRANTY.

See WINDING-UP OF COMPANY, 1, 2.

### **EXAMINATION FOR DISCOVERY.**

*Officer of defendant Company resident abroad—Service upon him while temporarily within the jurisdiction—Procuring his attendance for examination without an order—Practice—King's Bench Act, Rules 389 and 425—Striking out defence for failure to attend—Subpœna.*—Per HOWELL, C.J.M., and RICHARDS, J.A. A motion

to strike out the defence and counterclaim for non-attendance of an officer of the defendant company for examination for discovery should be refused when the subpoena served on the officer requires him to attend upon the examination, not only at the time and place named in the appointment, but also to attend there "from day to day until the above cause is tried to give evidence on behalf of the . . . ."

There is no authority whatever for this latter requirement, and a person who seeks such an unusual remedy as striking out the other party's defence for default must show that his own proceedings leading up to the application have in all respects been regular.

*Per* PERDUE, CAMERON and HAGGART, JJ.A. The motion should be refused because the defendant's solicitor had, as shown by an affidavit filed on the application to the Referee, offered to produce the officer, whose residence was at Los Angeles, California, for examination either on his return to Winnipeg or at Los Angeles, where the Company's head office was, which offer still stood open, but had not been accepted. The Court would not in any event make an order striking out the defence. The most it could be asked to do would be to order the officer to attend here at his own expense.

*Per* PRENDERGAST, J., in the Court appealed from. An officer of a foreign company, defending an action who, himself, resides out of the jurisdiction, cannot be compelled to attend here for examination for discovery by service upon him here of an

appointment and subpoena under Rule 389 of the King's Bench Act; though an order might, in a proper case, be made under Rule 425 requiring such attendance.

*Connolly v. Dowd*, (1897) 18 P.R. 38, followed.

*Macdonald v. Domestic Utilities Mfg. Co.* . . . . . 512

*See* COSTS, 2.

*See* PRACTICE, 7.

### EXCESSIVE DAMAGES.

*See* NEGLIGENCE, 2.

*See* NEW TRIAL.

### EXECUTORS AND ADMINISTRATORS.

*Right of action for damages, survival of—Non-suit—Verdict for nominal damages—Appeal—New trial.*—1. The administrator of the estate of a deceased person cannot recover damages in respect of a chattel belonging to the deceased for its detention or seizure during his lifetime or prior to the issue of the letters of administration, unless there is evidence to show that the chattel was damaged or that the estate of the deceased was depreciated by the seizure or detention in that period.

2. The administrator, however, is entitled to recover for the estate damages for being deprived of the use and possession of the chattel after the issue of the letters of administration.

3. Where the evidence shows that such last mentioned damages are only nominal, the Court of Appeal will not set aside a judgment of non-suit in the County Court for the purpose either of

ordering a new trial or of entering a verdict for \$1.00 for the plaintiff, but an appeal from such non-suit should be dismissed with costs.

*Scammell v. Clarke*, (1894) 23 S.C.R. 307; *Simonds v. Chesley*, (1891) 20 S.C.R. 174, and *Milligan v. Jamieson*, (1902) 4 O.L.R. 650, followed.

*Per* RICHARDS, J.A. Following *Hiort v. London and N. W. Ry. Co.*, (1879) 4 Ex. D. 188, and *Hogarth v. Jennings*, [1892] 1 Q.B. 907, the judgment of non-suit should be set aside and a verdict for \$1.00 nominal damages entered for the plaintiff without costs of the appeal, and without disturbing the award of costs to the defendant in the Court below.

*Day v. Horton* ..... 623

## EX PARTE APPLICATION.

*See* COUNTY COURTS, 2.

## EX PARTE ORDER.

*See* PARTIES TO ACTION, 1.

## EXPRESS TRUST.

*See* STATUTE OF FRAUDS.

## FELLOW SERVANTS' NEGLIGENCE.

*See* EMPLOYER AND EMPLOYEE.

*See* NEGLIGENCE, 3.

*See* RAILWAYS, 3.

## FENCES.

*See* RAILWAYS, 2, 5.

## FI. FA. GOODS.

Priority—Rateable distribution of money realized by Sheriff—*Executions Act*, R.S.M. 1902, c. 58, s. 25—Creditor's lien for costs

—*Assignments Act*, R.S.M. 1902, c. 8, ss. 8, 9.

Under section 25 of The Executions Act, R.S.M. 1902, c. 58, a sheriff who realizes any money under a writ of execution is bound to give notice thereof forthwith in the Manitoba Gazette and to keep the money for three months and then to distribute it rateably among all persons having unsatisfied executions in force in his hands at that time, and it makes no difference that the execution is for costs only.

A Judge has no jurisdiction to make an order in the face of the statute for the Sheriff to pay over the money without waiting for the expiration of the three months.

*Thordarson v. Jones*, (1908) 18 M.R. 223, explained as being only a decision to the effect that, when an execution debtor has made an assignment for the benefit of his creditors under the Assignments Act, R.S.M. 1902, c. 8, the assignee has no right to demand possession of the property seized by the Sheriff without payment to him of his own and the execution creditor's costs, as the statute gives a lien for them.

*Semble*—The Sheriff, on receipt of the amount of such costs, would be bound to observe the provisions of section 25 of the Executions Act, before paying over the money.

*Rural Municipality of Thompson v. Brethour* ..... 590

**FORECLOSURE.**  
*See* PARTIES TO ACTION, 2.  
*See* REAL PROPERTY Act, 1.  
*See* VENDOR AND PURCHASER, 9.

**FOREIGN CORPORATION.**

See PARTIES TO ACTION, 1.

**FORFEITURE OF LEASE.**

See LANDLORD AND TENANT, 1.

**FRAUD.**

See COMPANY, 3.

See PRINCIPAL AND AGENT, 5.

See STATUTE OF FRAUDS.

**FRAUDULENT  
CONVEYANCE.**

*Intent to defraud—Insolvency—Plaintiff suing for tort—Creditor—13 Eliz., c. 5.]—1.* When valuable consideration has been given for a conveyance of property by the debtor to a purchaser, the conveyance will not be set aside as fraudulent under the Statute of Elizabeth without clear evidence of an actual intent to defraud.

*Molson's Bank v. Haller*, (1890) 18 S.C.R. 88, and *Hickerson v. Parrington*, (1891) 18 A.R. 635, followed.

2. A plaintiff suing for a tort, such as slander or malicious prosecution, is not a creditor of the defendant until he has recovered judgment in the action, and has no status to impeach a conveyance as fraudulent against him, even though it was made because of the threatened action.

*Gurofski v. Harris*, (1896) 27 O.R. 201; *Cameron v. Cusack*, (1890) 17 A.R. 489, and *Ashley v. Brown*, (1890) 17 A.R. 500, followed.

In this case, the trial Judge held, upon the evidence, that the purchaser had given valuable and sufficient consideration for the conveyance impeached, that neither insolvency of the trans-

feror, nor intent to defraud, nor notice to the purchaser of the existence of a debt had been proved, and dismissed the action with costs.

*Fisher v. Kowslowski*.....769

**FRAUDULENT  
PREFERENCE.**

See REGISTERED JUDGMENT.

**FREEDOM OF ELECTION.**

See ELECTION PETITION, 4.

**GAMBLING IN GRAIN.**

See PRINCIPAL AND AGENT, 2.

**GUARANTY.**

*Joint guarantors—Husband and wife—Undue influence—Liability of remaining guarantors when one declared not to be bound—Principal and agent—Warranty of authority of agent—Oral evidence to explain signature of document—Right of contribution between co-sureties—Estoppel—Construction of contract.]—When a married woman disputes her liability to a creditor of her husband upon a guaranty signed by her at his request, the onus is upon her to prove that the husband had exerted an overpowering influence upon her to induce her to sign it and that the guaranty was an immoderate and irrational act on her part.*

*Nedby v. Nedby*, (1852) 5 De G. & Sm. 377, and *Bank of Montreal v. Stuart*, [1911] A.C. 137, followed.

T. S. was an officer and a shareholder in the debtor company and so interested in getting an extension of time and further credit from the plaintiffs. The only evidence as to her signing the



guaranty was her own, which was to the effect that she did not remember when or where it was signed, that she had full confidence in her husband and signed anything that he wanted her to sign without asking any questions, that he had not explained to her the nature of the instrument, nor had she asked him to do so.

The plaintiffs had been pressing for payment of the overdue account and J. A. S., the president of the S. Company, offered to procure the guaranty in question, if time were allowed and further goods supplied on credit. Plaintiffs' agent agreed to this and then J. A. S. prepared a form of guaranty and submitted it to the agent. On the latter approving of the form, J. A. S. got the guaranty signed and handed it to the plaintiffs' agent. Plaintiffs afterwards gave time and supplied further goods on credit. There was not sufficient evidence to show that the S. Company was insolvent at the time, or that the parties did not expect that it would get over its difficulties in consequence of the giving of the guaranty. Plaintiffs' agent knew nothing of how the signature of T. S. had been obtained.

*Held*, (CAMERON, J.A., dissenting) that, under these circumstances, T. S. was liable on the guaranty as she had not satisfied the onus that was upon her.

If the creditor has no notice of any improper influence by the husband in obtaining the wife's signature and, in consideration of the document, has given value or changed his position, the wife will be bound by it, unless the

creditor employed the husband to obtain the security and made him his agent in so doing and the husband used improper means to obtain the signature, or unless deception or fraud was used by the husband in obtaining the signature.

*Bischoff's Trustee v. Frank*, in appeal, (1903) 89 L. T. 188, cited in *Howes v. Bishop*, [1909] 2 K. B. at p. 397; *Talbot v. Von Boris*, [1911] 1 K. B. 854, and *Carlisle Company v. Bragg*, [1911] 1 K. B., per Buckley, L. J., at p. 495, followed.

*Turnbull v. Duval*, [1902] A.C. 429, and *Chaplin v. Brammall*, [1908] 1 K.B. 238, distinguished.

*Held*, also, that the evidence failed to bring the case within the principle laid down by Lord Macnaghten in *Bank of Montreal v. Stuart*, [1911] A.C. 120, namely, that, when there is evidence of overpowering influence and the transaction brought about is immoderate and irrational, proof of undue influence is complete.

*Per* CAMERON, J.A., This case cannot be distinguished from *Chaplin v. Brammall* and *Turnbull v. Duval*, in any important particular, and the wife should not be held liable upon the instrument. It may be that a contract signed by a married woman under the duress of her husband, she being aware of its nature and the liability imposed by it, is voidable, as against a holder for value, or a party taking the security and thereby changing his position, only if such party is aware of the duress, but in this case the evidence was that the wife did not know what she had signed and it was clear that, by acts,

words and acquiescence, the plaintiffs had authorized the husband to secure his wife's signature to the guaranty.

When it is a case of suretyship by the wife for the benefit of her husband, if the wife signs a document at the request of her husband, and no sufficient explanation of it is given to her and the creditor has left everything concerning the obtaining of the signature to the husband, then the creditor cannot succeed in an action against the wife on the security: *Howes v. Bishop*, [1909] 2 K.B. 390; *Halsbury*, vol. XV. 1017; *Lush on Husband and Wife*, (1910) at p. 206.

The Court dismissed the appeals against the following rulings of Metcalfe, J., in the Court below:—

1. The rule of law that, when one of several joint or joint and several sureties is released, all are released, is based on the principle that the creditor must do nothing to affect prejudicially the right of contribution between the co-sureties, and does not apply to a case where it is by no act or default of the creditor, but only by the operation of the law, that the one is released; as, for example, a wife under circumstances such as were shown in *Bank of Montreal v. Stuart*, *supra*.

2. When the creditor supplied goods upon the strength of a guaranty signed by three persons and also by one of those three as attorney for a fourth, two of them representing to the creditor that there was a good and sufficient power of attorney from the fourth person to the person who signed her name, and it turned out that

there was no such sufficient power of attorney, the two who made that representation will be liable to the creditor for a breach of warranty of authority on the principle laid down in *Collen v. Wright*, (1857) 8 E. & B. 647; *Firbanks v. Humphreys*, (1886) 18 Q.B.D. 60, and *Sliver v. Bank of England*, [1902] 1 Ch. 623, and it makes no difference that the attorney did not know that the power was insufficient.

*Weeks v. Property*, (1873) L.R. 8 C.P. 437, followed.

3. The document sued on was signed (in part) as follows:

"M. Stephenson

"Per Atty.

"W. Stephenson."

W. Stephenson contended that he had not signed for himself, but only as attorney for M. Stephenson his wife.

*Held*, that oral evidence was admissible to show that W. S. intended the document as executed to bind both himself and his wife, as such evidence, while explaining, in no way contradicted the writing.

*Young v. Schuler*, (1883) 11 Q.B.D. 651, followed.

4. The defendant, J.A.S., who was the president of the debtor company, and had undertaken to get the guaranty signed so that the plaintiffs would continue to supply goods to the company, objected that, as the guaranty was not really executed by his mother M.S., he was relieved upon the principle that it was not the guaranty which he intended to sign.

*Held*, that J. A. S. was estopped from saying that his mother was not a party to the guaranty,

because he had told the creditor that W. S. had a power of attorney from his mother to sign, intending that the creditor should believe the fact and act upon it, and the creditor did believe it and act upon it by supplying goods on the strength of it.

5. Following general words of guaranty, the document sued on contained this clause: "And in case of insolvency of the said (debtor) you may rank on the estate for your full claim and we jointly and severally agree to pay any balance."

*Held*, that this expression should not be construed as in any sense limiting the effect of the prior general words, or requiring the creditor to wait until the winding up of the estate by an assignee before suing for his claim.

*Gold Medal Furniture Co. v. Stephenson* ..... 159

Appeal to the Supreme Court quashed, 48 S.C.R., 497.

## **HAY**

*See* TRESPASS.

## **HIGHWAY CROSSING.**

*See* RAILWAYS, 1.

## **HIGHWAYS.**

*Special Survey Act, R.S.M. 1902, c. 158, as amended by 10 Edward VII, c. 62—Estoppel—Costs—Construction of statutes.*—The plaintiffs had title to a piece of land adjoining the westerly boundary of St. Mary's Road. They claimed that the road was only 66 feet wide at that point and erected their fence 33 feet from the centre line of the road,

the position of which was not disputed. The defendants contended that the road was 99 feet wide at that point and encroached upon the land inside the plaintiff's fence to a depth of 16½ feet all along the frontage of the property.

The transfer from the plaintiffs' predecessors in title described the land as commencing on the westerly limit of St. Mary's Road "as the said road is shown on plan 472". That plan showed the width of the road at the point in question to be 99 feet.

*Held*, that the plaintiffs were estopped from claiming title to the strip of land in dispute, whatever may have been the width of the road.

Before the trespasses complained of, in this action, proceedings had been taken under the Special Survey Act, R.S.M. 1902, c. 158, as amended by 10 Edward VII, c. 62, and a plan of the survey showing St. Mary's Road as 99 feet wide at the point in question had been duly approved and registered in accordance with the Act.

*Held*, (1) These proceedings had, by virtue of that Act, the effect of vesting the road to the width of 99 feet in the Province with the right of the defendant municipality to exercise jurisdiction over it to the full width and, therefore, to authorize their co-defendants to enter upon and perform work upon it, notwithstanding the possession the plaintiffs had taken of the strip in dispute.

(2) The notice published in the Gazette under the provisions of that Act, which stated that the

plan had been made "for the purpose of correcting errors in prior surveys of the above described portion of the said City and for the purpose of defining and establishing the location of boundaries of property within the same," was sufficiently comprehensive to cover the fixing of the width of the road and to authorize the approval by the Lieutenant-Governor-in-Council of the plan, and the registration of the plan became, under sections 15 and 17 of the Act, final and binding upon all parties whomsoever.

(3) The plan approved under the Special Survey Act should not be treated as an act of expropriation without compensation, but simply as evidence of the location of a boundary line, and that Act, being curative, remedial and beneficial in its purpose, should be construed liberally so as, if possible, to carry out the intention of the Legislature in making certain and defining property rights and eliminating litigation arising from vague and undetermined boundaries.

*St. Vital v. Mager*, (1909) 19 M.R. 293, in which it was decided that the width of the road in question at the adjoining lot was 66 feet, distinguished on the ground that the defendant in that case claimed title through the Hudson's Bay Company which title was not in any way complicated by plan 472 above referred to.

As, however, the plaintiffs here were probably led to enter into possession of the disputed strip of land because of that decision, the Court allowed the appeal without costs and ordered judgment to be

entered for the defendants, without costs.

*Peterson v. Bitulithic and Contracting Co.* ..... 136

## HUSBAND AND WIFE.

See GUARANTY.

## IDENTITY.

See ELECTION PETITION, 4.

## ILLEGALITY.

See COMPANY, 2.

## INFANT.

See NEGLIGENCE, 2.

See RAILWAYS, 1.

## INJUNCTION.

See CONTRACT, 1.

## INSOLVENCY.

See FRAUDULENT CONVEYANCE.

See REGISTERED JUDGMENT.

See WINDING-UP OF COMPANY.

## INSURANCE ON LIVE STOCK.

*Sale of goods insured—Assignment of insurance on goods sold made prior to loss without consent of insurers—Right of insurers to be subrogated to claim of insured—Principal and agent—Condition as to notices of illness and death of animal insured—Arbitration and award—Waiver—Acceleration of time for payment of promissory note under provision thereof—Construction of contract.*—1. The buyer of goods is not entitled to claim from the seller the benefit of any insurance he has on them unless the seller has contracted to give him such benefit.

*Martineau v. Kitching*, (1872) L.R. 7 Q.B. 436, followed.

2. An assignment, made after the sale of a horse and before its death, of the benefit of an insurance on it to the purchaser, has no effect to vest in the purchaser any right to the insurance money unless the insurers consent thereto.

*MacGillivray on Insurance Law*, p. 766; *Lynch v. Dalzell*, (1729) 4 Bro. P.C. 431, and *Saddlers Co. v. Badcock*, (1743). 2 Atk. 544, followed.

3. A letter from the agents of the insurance company to one of the purchasers, who had been making inquiries about the insurance on the horse and had requested to be put at ease with regard to it, stating "we are holding your interest in this insurance fully covered, but subject to the veterinary surgeon's report on the stallion and also subject to one-third reduction from his quotation of the present market value of the stallion," held, under the circumstances set forth in the judgment, not to show any consent by the insurance company to the assignment of the insurance, even if the letter had been binding on the company.

4. Although the policy required that notice of the illness or death of the animal should be given within 24 hours direct to the Company, whose head office for Canada was in Montreal, yet notice to the chief agents of the Company for Manitoba, appointed pursuant to the Manitoba Insurance Act, was held to be a sufficient compliance with the condition, if given in time.

5. A notice of the illness of the stallion, given by one of the

purchasers *within 24 hours after knowledge of the illness reached the plaintiffs*, the sellers, was a sufficient compliance with the condition requiring notice of the illness to be given by the insured *within 24 hours of the illness* to enable the plaintiffs to recover on the policy to the extent of their insurable interest in the stallion, although the illness commenced three days before to the knowledge of that purchaser.

Such a condition should be construed most strictly against the Company, and, if applied under all circumstances, is most unreasonable.

6. Notice of the death of the stallion given verbally to the agents the same day, and communicated by them to the Company's office in Montreal by telegram, was a sufficient compliance with the condition requiring notice of the death to be given in writing direct to the Company within 24 hours.

7. The insurers were entitled, on payment of the plaintiffs' claim, to be subrogated to that extent to the right of the plaintiffs against the purchasers of the horse upon promissory notes for \$1,000 given for part of the purchase money, the purchasers not having acquired any right to any benefit of the insurance on it.

Such right of subrogation arises upon making payment without any assignment or condition and without making any express reservation: *MacGillivray*, p. 733.

8. A provision in a promissory note payable at a given date enabling the payee, if for any reason he should consider the

note insecure, to declare it due and payable at any time, should be construed strictly; and, assuming that circumstances have arisen justifying the payee in acting upon the provision, it is necessary for him to "declare" the note due and payable before he can sue upon it. It is not sufficient merely to demand payment or security within a stated time, threatening action on default in so doing.

9. A condition in an insurance policy providing for arbitration on any claim under it as a condition precedent to any right of action on the policy may be waived by the company, and such waiver given to the insured might be relied on by a purchaser of the insured property claiming under an assignment of the insurance, if valid.

10. The plaintiffs, having sold the stallion and received all but \$1,000 of the purchase money, were entitled to recover only two-thirds of that sum and accrued interest thereon, as the policy, although it insured the animal for \$3,000, limited the liability of the Company to "two-thirds of the loss suffered by the insured."

*Gill v. Yorkshire Insurance Co., Ltd.* ..... 368

### **INTENT TO DEFRAUD.**

See FRAUDULENT CONVEYANCE.

### **INTENT TO PREFER.**

See REGISTERED JUDGMENT.

### **INTEREST.**

See CONTRACT, 2.

### **INTERLOCUTORY ORDER.**

See ELECTION PETITION, 3.

### **INTIMIDATION.**

See ELECTION PETITION, 4.

### **IRREGULARITY.**

See COUNTY COURT, 1.

See LOCAL OPTION BY-LAW, 1.

See PARTIES TO ACTION, 1.

### **JUDGE AND JURY, PROVINCES OF.**

See NEGLIGENCE, 1.

### **JUDGE'S CHARGE TO JURY.**

See NEW TRIAL.

### **JUDGMENT.**

See COUNTY COURT, 2.

See PRACTICE, 1, 3, 5.

### **JURISDICTION.**

See COUNTY COURTS, 2.

See PRACTICE, 1.

See REAL PROPERTY ACT, 1.

### **JURY TRIAL**

1. *When ordered—King's Bench Act, R.S.M. 1902, c. 40, s. 59 (b)—Action for damages for injury caused by alleged negligence.*—This action was for damages for personal injuries caused by the alleged negligence of the defendant in running with his automobile on the wrong side of the road into the plaintiff on his motor cycle.

The defendant disputed the alleged negligence. The collision caused serious injury to the plaintiff.

On his application the Referee

made an order, under sub-section (b) of section 59 of the King's Bench Act, for trial of the action by a jury and a Judge affirmed this order on appeal.

Defendant appealed.

*Held*, that the discretion of the Judge should not be interfered with and the appeal should be dismissed with costs to the plaintiff in the cause.

*Navarro v. Radford-Wright Co.*, (1912) 22 M.R. 730, explained.

*Clark v. Laing* ..... 537

2. *When ordered—King's Bench Act, R.S.M. 1902, c. 40, s. 59 (b)—Action for damages for injury caused by negligence.*—In an action for damages for an injury caused by defendants' alleged negligence, a trial by jury will be ordered, under sub-section (b) of section 59 of the King's Bench Act, R.S.M. 1902, c. 40, if the Judge is satisfied upon the material filed that the injury was serious and that the damages in case of success would be substantial.

*Navarro v. Radford-Wright Co.*, (1912) 22 M.R. 703, followed.

*Jocelyn v. Sutherland* ..... 539

3. *Practice—King's Bench Act, s. 59 (b)—Election of forum.*—Although the action is such that, if an application had been made at the proper time for an order under sub-section (b) of section 59 of the King's Bench Act, for trial by a jury, it would probably have been granted, yet such order should be refused in a case where the plaintiff has already set down the case to be tried by a Judge without a jury.

*McConnell v. Winnipeg Electric Ry. Co.* ..... 23

4. *King's Bench Act, R.S.M. 1902, c. 40, s. 59 (b)—Action for conspiring to cause wrongful dismissal and to slander plaintiff.*—The statement of claim alleged a conspiracy on the part of the defendants to cause the plaintiff to be unlawfully dismissed from his employment with the defendant company and a conspiracy to wrongfully and maliciously lay a charge of theft against the plaintiff before the company, also for wrongful dismissal of the plaintiff by the defendant company.

*Held*, following *Griffiths v. Winnipeg Electric Ry. Co.*, (1907) 16 M.R. 512, that the Referee had rightly exercised the discretion conferred upon him by sub-section (b) of section 59 of the King's Bench Act in ordering a trial of the action by a jury, as one at least of the causes of action was akin to, or within the general principles of, two of those referred to in that section, viz.: slander and malicious prosecution.

*Robinson v. Grand Trunk Pacific Ry. Co.* ..... 408

See PRACTICE, 4.

### LACHES.

See CONTRACT, 2.

See VENDOR AND PURCHASER, 2.

### LANDLORD AND TENANT

1. *Overholding tenant—Forfeiture of lease—Breach of covenants in lease—Covenant to use premises as a "store" only—Covenant not to carry on or permit to be carried*

*on any other trade or business—Assigning or sub-letting without leave—Construction of covenant.*]

The plaintiff sought to evict the defendant from his tenancy of the premises in question, by a summary application under the Landlords and Tenants Act, and alleged breaches of several of the covenants in the lease of the premises, which contained the usual proviso for re-entry on non-performance of covenants.

The defendant rented the premises for the expressed purpose of doing a boot and shoe repairing business and of selling boots and shoes by retail, which latter was not done.

The defendant had been in possession nearly a month before the lease was signed. During that period he had erected a wooden sign projecting 10 feet from the building. The projecting sign was there when the plaintiff signed the lease and he knew that then.

*Held*, (1) The mere giving by the tenant of permission to a real estate firm to put their cards in the window and to use any part of the premises any time of the day they wished, the tenant retaining sole control of the whole of the premises, and the real estate firm paying no rent, having no key nor the exclusive use or possession of any part of the premises, did not amount to a sub-letting and was not a breach of the covenant against sub-letting without leave: *Woodfall*, 18th ed. p. 572.

(2) The plaintiff could not forfeit the lease for breach of a covenant to use no projecting signs, merely because of the con-

tinuance of the sign which he knew was there when he signed the lease. The covenant had no retroactive effect and was only binding on the tenant as to his future acts.

*Holman v. Knox*, (1912) 3 D.L.R. 207, followed.

(3) As the premises were to be used as a boot and shoe repairing shop with the express consent of the plaintiff, the subsequent carrying on therein of a shoe shining business, as an adjunct to the other business, should not, under the circumstances, be deemed to be a breach of the covenant to use the premises as a "store" only and not to carry on or permit to be carried on any other trade or business. Cobbling and shoe shining, being both mechanical operations wholly unconnected with the selling of goods, and so having no relation to a "store," are not different in principle, and, if one was permissible under the covenant, the other should be also.

Reference to authorities on the meaning of the word "store."

(4) When a covenant in a lease, accompanied by a right of re-entry on breach, is so expressed that its meaning is doubtful, and the tenant in good faith has done what he supposed to be a performance of it, a forfeiture will not be enforced; the difficulty in construing the covenant is a special circumstance entitling the lessee to relief: *McLaren v. Kerr*, (1876) 39 U.C.R. 507. and *Wyndham v. Carew*, (1841) 2 Q.B. 317.

*Just v. Stewart* . . . . . 517

2. Liability to repair—Damages



*caused by defect in demised premises—Lease of unfurnished premises.*—In the absence of any special provision in a lease of an unfurnished house or suite in an apartment block, there is no liability on the part of the landlord to put or keep the demised premises in repair, or for any accident which may happen in consequence of the premises being in a dangerous and unsafe state, unless there has been fraud or misrepresentation on his part.

*Robbins v. Jones*, (1863) 15 C.B.N.S. 221; *Lane v. Cox*, [1897] 1 Q.B. 415, and *Cavalier v. Pope*, [1906] A.C. 428, followed.

A radiator in one of the suites of an apartment block, heated by a general steam plant in the basement, is a part of the demised premises on a lease of that suite, and the tenant cannot recover against his landlord damages caused by the radiator, which had been insecurely fastened to the ceiling of the room, breaking away by its own weight and falling to the floor; especially when the lease executed by the tenant contained a special provision that the landlord should not be liable for any injury or damage arising from any defects in, or accident to, any of the heating plant or service in the said suite and premises.

*Miller v. Hancock*, [1893] 2 Q.B. 177, distinguished.

*McIntosh v. Wilson* . . . . . 653

3. *Agreement for lease—Statute of Frauds—Contract of corporation—Seal of corporation—Delegation of authority to act for corporation—Appointment of agent of corporation—Estoppel—Ratifi-*

*cation.*—Action for damages for breach of agreement to take a lease.

The defendant lodge was organized under The Charitable Associations Act, R.S.M. 1902, c. 18. By resolution passed at a regular meeting of the lodge, the house committee, which had been previously appointed, was given power to rent or lease suitable club rooms. One Gibbs, who signed the letter upon which this action was based, though not named as a member of the house committee, was "Vice-dictator," or second chief officer of the lodge, and acted as chief officer in the absence of the "Dictator," and as a member of the house committee. He was active in endeavoring to secure suitable premises, acted as chairman of the committee in the absence of the elected chairman, and received the thanks of the lodge "for his untiring efforts on behalf of the house committee." After negotiations with the plaintiff for a lease of the premises in question, during which a verbal understanding was reached with Gibbs and four other members of the committee, Gibbs procured from the secretary of the lodge his firm's cheque for \$100.00 to be paid to the plaintiff, and the next day Gibbs, accompanied by the four, handed the cheque and a letter signed "Loyal Order of Moose, per W. G. Gibbs," to the plaintiff's rental agent, one Groves, and addressed to Groves, offering on behalf of the lodge to take a lease of the premises for two years to commence when the improvements agreed on should be completed

and asking for a written reply by noon the next day. The offer was duly accepted by the plaintiff, who received the \$100 and went to considerable expense in fitting up the premises to suit the defendants. He also sent the keys to the defendants, who retained them for three months. The secretary was afterwards reimbursed the \$100 out of the funds of the lodge, which payment was fully authorized. The defendants never took possession of the premises and repudiated the agreement for a lease at the time of returning the keys.

The Court found it clear upon the evidence that the lodge, acting by resolution, had delegated its powers with respect to renting club rooms to the house committee and that the committee had practically delegated their powers to Gibbs.

Nearly a month after the agreement, the defendants' solicitor wrote to the plaintiff a letter distinctly referring to the lease and complaining that, by reason of delay in completing the alterations agreed on, the lodge had lost an opportunity of sub-letting a portion of the premises.

*Held*, (1) That Gibbs was authorized to sign the written offer on behalf of the defendants, and that it was not necessary that his appointment should have been under seal of the lodge, as the plaintiff dealt with him in good faith and without notice of any informality in his appointment.

*Faviell v. Eastern Counties Ry. Co.*, (1848) 2 Ex. 344; *Mahony v. East Holyford*, (1875) L.R. 7 H.L. 869; *Wilson v. West Hartle-*

*pool*, (1864) 34 Beav. 187, and *Muldowan v. German-Canadian Land Co.*, (1909) 19 M.R. 667, followed.

(2) In any event there were acts of acquiescence on the part of the lodge sufficient to ratify and confirm the contract and to estop the defendants from denying it.

*Hoare v. Mayor of Lewisham*, (1901) 85 L.T. 282; *Conway Bridge Commissioners v. Jones*, (1910) 102 L.T. 92, and *Reuter v. Electric Telegraph Co.*, (1856) 6 E. & B. 341, followed.

(3) Parol evidence was admissible to show that Groves was the plaintiff's agent, and the Statute of Frauds does not prevent the enforcement by a principal of a contract in writing which his agent has made for him in the agent's own name.

*Commins v. Scott*, (1875) L.R. 20 Eq. 11; *Morris v. Wilson*, (1859) 5 Jur. N.S. 168, and *Filby v. Hounsell*, [1896] 2 Ch. 737, followed.

*Pulford v. Loyal Order of Moose*..... 641

## LEASE.

See TRESPASS.

## LIEN.

See FI. FA. GOODS.

## LIEN NOTES.

See LIMITATION OF ACTIONS, 2.

## LIEN ON SHARES.

See COMPANY, 1.

## LIMITATION OF ACTIONS.

1. *Amendment—Parties to action.*—The plaintiff, having a

good cause of action against the defendant, commenced this action within the time allowed by the Statute of Limitations, but, by mistake, the action was brought in the names of himself and his partner who had really no right to share in the claim. After the expiration of the statutory period, the statement of claim was amended by striking out the name of the partner as a plaintiff.

*Held*, that this did not affect the plaintiff's right to recover.

*Ferguson v. Bryans*, (1904) 15 M.R. 171, distinguished.

*Chisholm v. Wodlenger* . . . . 828

2. *Bills and Notes—Lien notes—Right of action, when it accrues.*]

—1. The maker of a promissory note or the acceptor of a bill of exchange has the whole of the last day of grace in which to pay it and an action upon it cannot be commenced until the next day.

*Kennedy v. Thomas*, [1894] 2 Q.B. 759, followed.

*Sinclair v. Robson*, (1858) 16 U.C.R. 211, not followed.

*Dictum* of Richards, J., in *Keddy v. Morden*, (1905) 15 M.R. at p. 632, overruled.

2. The holder of an instrument of the kind usually called a lien note, payable "on or before the first day of November, 1904," could not have brought an action upon it until 2nd November, and, therefore, the last day of the six years allowed by the Statute of Limitations for the bringing of the action would be 1st November, 1910, and an action on the note commenced on that date is not barred by the statute.

*Willoughby v. Wainwright* . 289

## LIQUOR LICENSE ACT.

*Club—Permit to keep liquor for use of members—Mandamus—Powers of License Commissioners—Discretion.*]

—Section 10 of chapter 31 of Edw. VII, amending the Liquor License Act, provides that the License Commissioners may, under certain conditions, grant permission to a club to keep liquor on the club premises for the use of its members on payment of the prescribed fee.

*Held*, that the exercise of this power by the License Commissioners is discretionary and not obligatory, although the club applying for such permission may have fulfilled the statutory requirements, and that, the Commissioners having exercised their discretion by refusing the permission, the Court should not interfere by *mandamus* to compel them to grant the permission, except under special circumstances which had not been shown to exist in this case.

*Re Club Laurier* . . . . . 24

## LOCAL JUDGE OF KING'S BENCH.

See PRACTICE, 1.

## LOCAL OPTION BY-LAW.

1. *Publication of notice of the voting—Liquor License Act, R.S.M. 1902, c. 101, s. 66, as amended by 1 Geo. V, c. 25, s. 1, and s. 76A as enacted by 2 Geo. V, c. 34, s. 1.—Irregularity.*]

—The requirement of section 66 of the Liquor License Act, R.S.M. 1902, c. 101, as amended by s. 1 of c. 25 of 1 Geo. V, that the Council shall publish the notice of the voting there

provided for in some newspaper within two weeks after the first and second readings of a proposed local option by-law, is mandatory and failure to comply with such requirement is fatal to the by-law.

*Hall v. South Norfolk*, (1892) 8 M.R. 438; *Little v. McCartney*, (1908) 18 M.R. 323, and *Shaw v. Portage la Prairie*, (1910) 20 M.R. 469, followed.

The failure to comply with that requirement is not a mere irregularity, but a matter of substance, and is, therefore, not cured by section 76A of the Act as enacted by section 1 of c. 34 of 2 Geo. V.

*Re Bell and Township of Elma*, (1906) 13 O.L.R. 80, decided under the corresponding provision in the Ontario Municipal Act, s. 204, followed.

*Smith v. North Cypress* . . . 508

2. *By-law repealing—Liquor License Act*, R.S.M. 1902, c. 101, ss. 66, 68, 76A—*Municipal Act*, R.S.M. 1902, c. 116, ss. 98, 99, 200, 376—*Notice of voting on by-law—Electors voting at unauthorized polls—Directory or imperative requirements of statutes—Curative provision of statute.*]—Appeal from judgment of MACDONALD, J., granting an application to quash a by-law repealing a Local Option by-law of the Municipality.

*Held*, that section 66 of the Liquor License Act, R.S.M. 1902, c. 101, provides a complete list of specifications as to what should be done by the Council in giving notice to the electors of the object of the by-law and where and when the vote would be taken

upon it, and section 68, which provides that all proceedings at and for the purpose of taking the poll shall be conducted in the same manner as voting upon any by-law required by the Municipal Act, R.S.M. 1902, c. 116, to be voted upon, does not import the provisions of section 376 of the Municipal Act as to the giving of notice of the by-law and of the voting, so that it is not necessary that such notice should be posted up.

It was objected that 16 of the electors entitled to vote on the by-law voted in a sub-division in which they were not entitled to vote under section 98 or 99 of the Municipal Act, upon certificates given them by the clerk of the Municipality which he was not authorized to give under section 102 of the Act, and it was contended that these votes must be taken as cast illegally and deducted from the number recorded as voting in favor of the by-law which would have left a majority against it.

It appeared, however, that the clerk had given out these certificates without discrimination as between the two parties interested, both of whom had obtained and used them.

*Held*, that it could not be said that these votes were unlawful votes or wholly void, and that the taking of them in the manner set forth was at most an irregularity which did not affect the result of the election and which was, therefore, cured by the provisions of section 76A added to the Liquor License Act, by 2 Geo. V, c. 34, s. 1, if not by section 200 of the Municipal Act.

*Brown v. East Flamborough*, (1911) 23 O.L.R. 534, and *Re Cleary and Nepean*, (1907) 14 O.L.R. 394, distinguished.

Appeal allowed with costs and application dismissed with costs.

*Re Rural Municipality of Thompson* . . . . . 361

### MANAGING DIRECTOR.

See COMPANY, 5.

### MANDAMUS.

*Practice*—*Motion for mandamus*—*Building by-law*—*Winnipeg Charter*, s. 703 (28).—Under Rules 875 to 888 of the King's Bench Act, although a Judge makes an order, under Rule 879, permitting an application for a *mandamus* to be made by motion without commencing an action, the former practice of applying in the name of the Sovereign *ex rel.* the applicant has not been done away with, and a motion by the applicant direct is irregular.

An applicant for a *mandamus* should have a legal right to the performance of some duty of a public and not merely a private character, and there must be no other adequate legal remedy.

The applicants had not complied with the building by-law of the City, passed under par. (28) of s. 703 of the Charter, which required the filing of a written application for the building permit which they asked for and the pre-payment of the prescribed fee. They relied upon the fact that, when they applied verbally for the permit, the building inspector told them he could not issue it as he had received instructions from a committee of the City Council not to do so.

*Held*, that the applicants, seeking to enforce a strictly legal right, should have placed themselves in a position to demand it by complying strictly with the by-law, and the statement of the building inspector that he would not grant it was no excuse.

*Semble*, the applicants could not succeed because, also, the relief for which they were asking was in respect of what was a merely private right.

*Frankel v. City of Winnipeg* . 296

### MASTER AND SERVANT.

See EMPLOYER AND EMPLOYEE.

See NEGLIGENCE, 3.

### MASTER'S OFFICE, PRACTICE IN.

See PARTIES TO ACTION, 2.

### MEASURE OF DAMAGES.

See ARCHITECT, 1.

See ASSIGNMENT OF CHOSE IN ACTION.

### MECHANICS' LIEN.

*Mechanics' and Wage Earners' Lien Act*, R.S.M. 1902, c. 110, s. 22 —*Parties to action*—*Registered owner a necessary party*.—Under section 22 of the Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, a claim of lien under the Act cannot be "realized" unless the person who is the registered owner of the land at the time of the commencement of the action is made a party to it, or unless there is some other action, to which such owner is a party, pending in which the claim may be "realized," and, in such case, although the lien has been duly registered within the time

required by the Act, it absolutely ceases to exist unless some action to which the registered owner is a party has been commenced under the provisions of the Act, within the period of 90 days prescribed by the Act.

It is too late after the expiration of that period to amend by adding the registered owner as a party defendant.

*Abramovitch v. Vrondessi*. .383

### **MINING LOCATION.**

See PARTNERSHIP, 3.

### **MISDIRECTION AND NON-DIRECTION.**

See NEW TRIAL.

### **MISNOMER.**

See ELECTION PETITION, 4.

### **MISREPRESENTATION.**

*Vendor and purchaser—Sale of going concern—Caveat emptor—Simplex commendatio.*] — The plaintiff's claim was for specific performance of the defendant's agreement to purchase certain lots in the village of Elgin, Manitoba, and certain goods and chattels consisting of horses, buggies, cutters, harness, &c., constituting the equipment of a livery business carried on by the plaintiff in a barn or stable situated on said lots, for the sum of \$10,500.

The trial Judge's findings of fact were that, in making the purchase, the defendant relied on the following statements and representations of the plaintiff as to the property and business, viz.: that the earnings of the business were from \$20 to \$30 a day, whereas they did not exceed \$10

a day; that the horses, except one team, were from 5 to 7 years old, whereas they were all more than double the ages represented; that the barn and equipment were in first-class condition, and that the proprietor of the only livery business in competition with the plaintiff was a man who drank very heavily and was neglecting his business; that these representations were untrue to the knowledge of the plaintiff; that they were a substantial inducing cause of the sale and were material to the contract, also that the actual value of the property purchased did not exceed \$5,000.

*Held*, that the defendant was justified in refusing to complete his purchase and the plaintiff could not have specific performance.

The representations referred to went far beyond *simplex commendatio*, as the plaintiff knew well that the defendant was placing trust and confidence in him and was acting without independent advice or proper investigation.

The defendant had some months previously purchased a chattel mortgage upon the goods and chattels and had, at that time, made an inspection of the property that was sufficient for that purpose. He made no further inspection or investigation before entering into the purchase in question.

*Held*, that, under the circumstances, the rule of "*caveat emptor*" should not be applied to prevent the defendant from getting relief from a bargain so improvident.

*Johnston v. Dowsett* . . . . .492

See ASSIGNMENT OF CHOSE IN ACTION.

See COMPANY, 4.

See VENDOR AND PURCHASER, 3, 7.

### **MISTAKE.**

See VENDOR AND PURCHASER, 7.

### **MOTION FOR JUDGMENT.**

See PARTIES TO ACTION, 2.

See VENDOR AND PURCHASER, 9.

### **MORTGAGE.**

See REAL PROPERTY ACT.

### **MUNICIPAL ELECTIONS.**

See LOCAL OPTION BY-LAW, 2.

### **MUNICIPALITY.**

1. *Municipal Corporations* — *Licensing of pool-rooms—By-law—Ultra vires—Municipal Act, R.S.M. 1902, c. 116, s. 640, s-s. (a) as re-enacted by 6 & 7 Edw. VII, c. 27, s. 10—Revocation of license—Three-fourths majority—Licensee not heard—Presumption of good faith.*—Under sub-section (a) of section 640 of the Municipal Act, as re-enacted by 6 & 7 Edward VII, c. 27, s. 10, which empowers a municipality to pass by-laws for licensing, regulating and governing pool-rooms, and for revoking any such license on grounds to be fixed by by-law, the Council of the Town of Swan River passed a by-law providing for the issue of pool-room licenses and that when, in the opinion of the Council, any such licensee has allowed profanity or gambling or boisterous conduct in the licensed premises \* \* \* then such

licensee shall be liable to have his license revoked, upon a motion of the Council carried by a three-fourths majority

In his application for such a license, the appellant agreed that the license should be subject to such by-law, and the license issued to him was made subject to this by-law.

On application by the appellant to quash a resolution of the Council subsequently passed by a three-fourths majority cancelling his license forthwith,

*Held*, (1) The by-law was authorized by the statute and should not be set aside either as unreasonable or discriminatory, and, therefore, the license, being subject to this by-law, was revocable as therein provided.

(2) The licensee, having accepted his license subject to the provisions of the statute and of this by-law, and there being nothing to suggest that the Council acted arbitrarily or otherwise than with a *bona fide* desire for the peace and good government of the town, and with full knowledge of the facts, their resolution should not be quashed because it was passed without notice to the licensee and he was not given an opportunity of showing cause against it.

(3) Swan River being a small town, it should be assumed that the Council fairly represented the citizens of it and would either have knowledge of the facts from personal observation or would inform themselves of the existing conditions before taking such action as they did.

*Kruse v. Johnson*, [1898] 2 Q.B. 91, and *Walker v. Stratton*, (1896)

12 T.L.R. 363, followed as to the principles to be applied in dealing with by-laws of municipalities attacked as being unreasonable or *ultra vires*.

*Scott v. Pilliner*, [1904] 2 K.B. 855, and *Strickland v. Hayes*, [1896] 1 Q.B. 296, distinguished.

*Re Crabbe and Swan River*. . 14

2. *Drainage — Negligent construction of ditch—Damage by flooding plaintiff's land.*—Although a municipal corporation, charged with the development of the country, the grading of roads and the digging of ditches for drainage purposes, should receive great consideration in the matter of liability for damages caused by the works, yet it should exercise care in the doing of its work; and, if it begins to dig a ditch at the wrong end, bringing water to a point where there is no outlet, and lets that water lie there for an unreasonable time, whereby more water is brought on to the plaintiff's farm than there would have been if the work had not been done, and the plaintiff suffers damage in consequence, the municipality will be liable therefor.

*Mondor v. Tache* . . . . . 457

3. *Drainage — Negligence — Damage by flooding—Obstruction of drains — Notice — Municipal Act, R.S.M. 1902, c. 116, s. 516A enacted by 3 & 4 Edward VII, c. 36, s. 1.*—1. A municipality is not liable under section 516A added to the Municipal Act by section 1 of chapter 36 of 3 & 4 Edw. VII, or any other statute, for damages suffered by a citizen from an overflow of water into

his basement caused by a sudden thaw or heavy rains and a stoppage of the drains constructed for the purpose of carrying away the surplus water, unless its officials have had time enough after notice of the obstruction to remove same.

*Rice v. Whitby*, (1898) 25 A.R. 191, followed.

2. A plaintiff cannot recover damages against the municipality caused by water flowing into his basement at a hatchway if he could have kept out the water by slightly banking it up with earth.

3. The non-removal by a municipality of a large quantity of ice left on the ground by the freezing of water that had escaped in the winter from a burst water main, thus adding to the quantity of water that would have to be taken care of at the opening of spring, does not impose any additional obligation on the municipality when the bursting of the main was purely accidental, and it was repaired as promptly as possible.

*Portage Fruit Co. v. City of Portage la Prairie* . . . . . 822

## NEGLIGENCE.

1. *Street railway — Evidence — Plaintiff's witnesses contradicting each other — Non-suit — Respective functions of Judge and jury at trial.*—Action for damages for injuries received in falling from the steps of a street car. The negligence relied on was in suddenly starting the car while the plaintiff was preparing to alight at a street corner where it had stopped in response to her signal, whereby she was thrown to the ground and seriously injured.



The plaintiff's evidence was that she had signalled the car to stop at Gunnell Street, that she went to the vestibule to be ready to get off, that the car stopped while she had a foot on the first step and her hand on the rail and that she remembered no more. The rules of the Company required the motorman to cross completely over the street before stopping.

The only other evidence was that of one Winkler, who said he was on Gunnell Street, a block away from the place of the accident, that he saw the car in question going fast across Gunnell Street, heard the woman make a noise, went to the place and found the plaintiff lying about the middle of Gunnell Street, at the intersection of Logan Avenue along which the car was going, and that he did not see the car stop, although in another part of his evidence, in answer to the question, "It didn't stop?" he said, "No, perhaps a second it stopped and then went on."

The defendants did not call the conductor or motorman of the car.

*Held*, (PERDUE, J. A., dissenting), that there was sufficient evidence to warrant the jury in finding as they did. that the motorman or conductor had caused the car to stop at Gunnell Street, and to start again at the moment when the plaintiff was proceeding to alight, that such starting of the car was negligent and that the plaintiff had fallen off or been thrown from the car thereby; and, that, therefore, the verdict of the jury in plaintiff's favor should stand.

*Metropolitan Ry. Co. v. Jackson*, (1877) 3 A.C. 193, and *Bridges v. North London Ry. Co.*, (1874) L.R. 7 H.L. 213, followed.

*Held*, also, that, although a witness called by the plaintiff contradicts his evidence as to a material point, the plaintiff is not thereby concluded, but the case must be left to the jury as to which story they will believe.

*Stanley Piano Co. v. Thomson*, (1900) 32 O.R. 341, followed.

*Sumner v. Brown*, (1909) 25 T.L.R. 745, not followed.

*Per* PERDUE J. A., dissenting. The plaintiff's evidence left it altogether doubtful as to what caused her to fall. She could not say, and did not attempt to say, what caused it. She might have slipped and fallen while alighting. She might have been seized with a sudden vertigo which caused her to fall, or she might have been struck by a passing vehicle.

When two inferences may be drawn, one of which implies negligence and the other one does not, and there is no presumption in favor of one rather than the other, then the plaintiff fails to prove his case: *Wakelin v. London & S.W.R.*, (1886) 12 A.C. 41; *Pomfret v. Lancashire & Yorkshire Ry.*, [1903] 2 K.B. 718, and *McKenzie v. Chilliwack*, [1912] A.C. 888.

Taking into consideration the rule of the Company that cars should only stop after completely crossing the street, the fact that the plaintiff was found in the middle of the street and Winkler's evidence that the car went rapidly across the street, the most reasonable inference to draw is that the plaintiff fell from the step while

the car was in motion and before it reached the proper stopping place. If so, the plaintiff was injured as a result of her own negligence and should not recover.

*Schwartz v. Winnipeg Electric Ry. Co.* ..... 60  
[Affirmed in Supreme Court.]

2. *Street railway—Infant—Damages—Verdict of jury—Excessive damages—Evidence—New Trial—Evidence Act, R.S.M. 1902, c. 57, s. 39.*—The plaintiff, a boy eight and a half years old, suing by his father as next friend, had a verdict for \$8,000 damages in this action which was for an injury resulting in the loss of his right arm below the elbow caused by a street car of the defendants running over him negligently as it was alleged. The verdict was a general one, no questions having been put to the jury, and there was nothing to show upon what act or acts of negligence the jury had based their verdict.

The plaintiff was tendered as a witness but the trial Judge did not think that he understood the nature of an oath and did not permit him to be sworn. He also declined to admit the boy's unsworn testimony under section 39 of the Evidence Act, R.S.M. 1902, c. 57, although some of his answers on the stand indicated that he understood the duty of telling the truth.

There was only one witness called by the plaintiff who actually saw the accident happen, one Taylor, and his evidence differed in material respects from that of the only eye witness

called by the defendants, the motorman.

*Held*, that there should be a new trial for the following reasons:—

(1) Taylor's account of what took place, summarized in the judgment, was far from satisfactorily establishing such a case of negligence against the defendants that a jury would be justified in basing their verdict upon his testimony alone.

2. Assuming that the boy had the ordinary intelligence of a child of his age, his own negligence may have been the cause of the accident.

(3) It would be desirable to have the evidence of the plaintiff himself as to how the accident happened, either under oath or by way of statement under section 39 of the Evidence Act.

(4) The damages allowed were exceedingly large, if not excessive under the circumstances, as the amount would, if properly invested, taking into account the plaintiff's condition in life, support him for the rest of his life.

In awarding damages the jury ought not to fix such a sum as, if invested, would produce the full amount of income which the plaintiff might be expected to earn if he had not been injured, but ought to take into account the accidents of life and other matters and, in this case, that the plaintiff had not been completely disabled. They should take a reasonable view of the case, and give the plaintiff, not the full amount of a perfect compensation for the pecuniary injury, but only what they con-

sider, under the circumstances, a fair compensation for his loss.

*Rowley v. London & N.W.R.*, (1873) L.R. 8 Ex. 221, and *Johnston v. G.W.R.*, [1904] 2 K.B. 250, followed.

*Schwartz v. Winnipeg Electric Ry. Co.*..... 483

3. *Common employment*—*Volenti non fit injuria*—*Defect in system of carrying on work*—*Liability of employer at Common Law*.—1. The doctrine that an employer is not liable at Common Law for injuries caused to a workman by the negligence of a fellow servant does not apply to actions for injuries resulting from defective places in which to work, defective machinery with which to work, or defective or dangerous systems of carrying on work deliberately adopted by the employer or those entrusted by him with the superintendence of the work.

*Ainslie v McDougall*, (1909) 42 S.C.R. 420; *Brooks v. Fakkema*, (1911) 44 S.C.R. 412, and *Smith v. Baker*, [1891] A.C. 325, followed.

The plaintiff was employed at boring holes in pieces of iron by means of four drills operated from one common shaft in the defendants' machine shop under the direction and control of certain foremen. The four drills revolved together and one could not be stopped without all being stopped at the same time. Each drill could, while in motion, be moved from side to side or raised to a height of six inches above the piece of iron to be bored. At first the plaintiff was allowed to stop all the drills during the

operation of removing a completed job and placing and clamping on the table a new piece of material to be bored; but, afterwards, two workmen including the plaintiff were required to work with the same set of drills and to change the material to be bored without stopping the drills, in order to save time. This was by the order of the head foreman in that particular shop, confirmed by the superintending foreman over all the defendants' repair shops in Winnipeg. The plaintiff objected to the new mode of operation as being dangerous to him, but without avail; and, shortly afterwards, his sleeve was caught in one of the rapidly revolving drills while he was engaged in adjusting and clamping a new piece of material on the table and his arm was rendered useless.

The jury found that the plaintiff's injury was caused by the negligence of the defendants in keeping the machinery running during the operation of changing material to be drilled.

*Held*, that the findings of the jury were justified by the evidence, that the facts brought the case within the principle above stated and that the plaintiff was entitled to recover at Common Law.

2. The maxim *volenti non fit injuria* does not apply to the case of a workman who, although knowing the danger of continuing to work under the conditions required of him, yet, after protesting against it, continues to work under the conditions imposed because he must either do so or give up his employment.

*Smith v. Baker*, [1891] A.C. 325, and *Williams v. Birmingham*, [1899] 2 Q.B. 338, followed.

*Weppler v. Canadian Northern Ry. Co.* ..... 665

See ARCHITECT.

See EMPLOYER AND EMPLOYEE.

See JURY TRIAL, 1, 2.

See MUNICIPALITY, 2, 3.

See NEW TRIAL.

See RAILWAYS.

### NEW TRIAL.

*Excessive damages — Judge's charge to jury—Misdirection and non-direction—Injury caused by negligence.*—In estimating the amount of damages to be awarded to a plaintiff for an injury caused by defendants' negligence and rendering the plaintiff incapable of following his career as a railroad fireman, the jury should not give such a sum as would be simply an investment for the plaintiff and enable him to live thereafter without working, if he is still capable of earning a livelihood in other ways, and should take into consideration the chances and accidents of life and other elements, and, if the charge of the trial Judge is such as to lead the jury to infer that they need not consider the facts that the plaintiff is not wholly disabled and still has reasonable opportunities of engaging in other employment, having a fair education, and the amount of the verdict is so large as to lead to the inference that they did not consider those facts and is far in excess of what the Court thinks reasonable under the circum-

stances, there should be a new trial.

So held by RICHARDS, PERDUE and HAGGART, JJ.A., following *Johnston v. Great Western Railway*, [1904] 2 K.B. 250, and *Rowley v. London and N. W. Ry.*, (1873) L.R. 8 Ex. 221.

HOWELL, C.J.M., and CAMERON, J.A., dissented, holding that, although the amount of the verdict was, in their opinion, too large, yet it was not so large as to be perverse or to indicate that it must have been based on an untenable measure of damages, that non-direction had not been complained of at the trial, and that there had been no such misdirection by the trial Judge as to warrant an order for a new trial.

*Pickering v. Grand Trunk Pacific Ry. Co.* ..... 723

See EXECUTORS AND ADMINISTRATORS.

See NEGLIGENCE, 2.

### NOMINAL PURCHASER.

See VENDOR AND PURCHASER, 1.

### NON-SUIT.

See EXECUTORS AND ADMINISTRATORS.

See NEGLIGENCE, 1.

### NOTICE.

See MUNICIPALITY, 3.

See REGISTERED JUDGMENT.

### NOTICE OF CANCELLATION.

See VENDOR AND PURCHASER, 2, 4.

### NOTICE OF TRIAL.

See PRACTICE, 2, 4.

**NOTICE OF VOTING.***See* LOCAL OPTION BY-LAW, 2.**OBJECTIONS NOT RAISED AT TRIAL.***See* COUNTY COURTS, 2.**OBSTRUCTION OF DRAINS.***See* MUNICIPALITY, 3.**OFFICER OF CORPORATION.***See* COSTS, 2.*See* EXAMINATION FOR DISCOVERY.**OPTION DEALINGS ON GRAIN EXCHANGE.***See* PRINCIPAL AND AGENT, 2.**ORIGINATING NOTICE.***See* WILL, 1, 2.**OVERHOLDING TENANT.***See* LANDLORD AND TENANT, 1.**OWNERSHIP OF SHARES.***See* COMPANY, 1, 3.**PAROL EVIDENCE.***See* STATUTE OF FRAUDS.*See* VENDOR AND PURCHASER, 10.**PART PERFORMANCE.***See* VENDOR AND PURCHASER, 6.**PARTIES TO ACTION.**

1. Foreign corporation as defendant—Service of statement of claim out of jurisdiction—Practice—*Ex parte* order—Referee, jurisdiction of—Rescinding order—Time for moving to rescind—Irregularity—Costs—*King's Bench Act, Rules 201 (g), 342,*

438.]—When the statement of claim in an action against two defendants, one of whom is resident within the jurisdiction and the other is not, sets up more than one claim against the resident defendant, but only one as against both defendants, the non-resident defendant is a proper party to the action in respect of that claim and, under Rule 201 (g) of the King's Bench Act, the service of the statement of claim on him out of the jurisdiction should be allowed to stand, but the condition should be imposed that proceedings at the trial and otherwise, so far as that defendant is concerned, should be restricted to that part of the plaintiff's claim which alone affected that defendant.

*Massey v. Heynes*, (1888) 21 Q.B.D. 330, followed.

The Court refused to impose the further condition that, if the plaintiff should fail to establish his claim against the resident defendant in respect of that part of the claim, then his action should be dismissed as against the non-resident defendant, as it might have done on the authority of *Jones v. Bissonette*, (1902) 3 O.L.R. 54, and left that question to be dealt with by the Judge presiding at the trial.

The non-resident defendants had obtained from the Referee an order setting aside the service on them on notice to the plaintiff only. Afterwards on motion of the resident defendant, the Referee rescinded his former order.

*Held*, per MATHERS, C.J., K.B.:

(1) That the Referee's first order, as far as the resident defendant was concerned, was an

*ex parte* order and the Referee had jurisdiction to rescind it.

(2) That, although the motion to rescind was not made within four days as required by Rule 438, the Referee could, under Rule 342, decline to give effect to the objection.

Costs of the appeal and of the appeal to the Chief Justice from the Referee's order referred to be disposed of by the trial Judge.

*Swanson v. McArthur* . . . 84

2. *Adding parties in the Master's office—Vendor and purchaser—Foreclosure of agreement for sale—Action by vendor to remove caveat filed by assignee of interest of sub-purchaser in the land—Motion for judgment—King's Bench Act, Rule 40.*—Plaintiff sold the land in question under agreement of sale to defendant C. C sold to McIntosh and Burdick and Burdick assigned his interest in the land to defendant Bray as security for money borrowed. Bray filed a caveat to protect his interest as lender. Plaintiff then commenced this action for foreclosure of his agreement of sale to C and for the removal of defendant Bray's caveat.

*Held*, that McIntosh and Burdick were necessary parties to the action and that, in their absence, the plaintiff could not have final judgment, under Rules 615 and 616 of the King's Bench Act, against Bray upon admissions in the pleadings or in the examinations of the parties.

It would not be sufficient to add the sub-purchasers as parties in the Master's office under Rule 40 of the Act, because no direct relief can be had against parties

so added and they could not themselves get any relief against co-defendants beyond what is claimed by the plaintiff: *Holmsted & Langton*, 3rd ed. p. 867.

*Campbell v. Imperial Loan Co.*, (1905) 15 M.R. 614, and *Sveinson v. Jenkins*, (1911) 21 M.R. 746, followed.

*Watson v. Cadwallader* . . . 760

See COMPANY, 2.

See LIMITATION OF ACTIONS, 1.

See MECHANICS' LIEN.

## PARTNERSHIP.

1. *Costs in partnership action—Partnership assets, what are—Partnership Act, R.S.M. 1902, c. 129.*—The rule as to costs of a partnership action is that they should be paid out of the partnership assets unless there is some good reason to the contrary, and the unsuccessful assertion of some right is not of itself sufficient reason for departing from that rule. There must be either misconduct or negligence on the part of one partner to warrant his being ordered to pay costs.

Partnership assets mean the assets remaining after payment of all the partnership debts including balances due to any of the partners: *Hamer v. Giles*, (1879) 11 Ch.D. 942, and *Austin v. Jackson*, reported in foot note to that case.

When, therefore, there are no partnership assets in the above sense, there should be no order as to costs.

*Clark v. Wilson* . . . 10

2. *Assignment for benefit of creditors—Two separate businesses carried on by two persons as part-*

*ners—Assignments Act, R.S.M. 1902, c. 8, s. 27—Ranking of creditors of partnership and of the individual partners.]—1. The fact that two partners carried on two separate businesses under different firm names does not make them members of two different co-partnerships within the meaning of section 27 of the Assignments Act, R.S.M. 1902, c. 8, and, although, on becoming insolvent, they make two separate assignments, under the Act, of all their property, both partnership and individual, except exemptions, all the partnership assets should be pooled and administered by the assignee as a single partnership estate.*

*Banco de Portugal v. Waddell, (1880) 5 A.C. 161, followed.*

2. In such a case the creditors of either or both of the businesses are entitled to share in the pooled assets, and the separate creditors of each partner are entitled to payment out of the separate property of that partner. If, however, there are no separate creditors of one partner, the property assigned by him will form part of the partnership estate to be administered.

*Re Gillespie* . . . . . 5

3. *Agreement to enter into partnership—Mining location—Statute of Frauds—Costs.]—The defendant agreed to stake two mining claims for the plaintiffs and one for himself and that the three claims should then be worked together on a partnership basis. The plaintiffs advanced moneys to the defendant from time to time to enable him to*

stake the claims and register them.

Defendant staked only one claim and that in his own name. There was no evidence that each claim was to be jointly owned by the three parties.

*Held*, that there was no actual partnership entered into, but only an agreement to form a partnership on certain conditions, and that, therefore, the plaintiffs were not entitled to a declaration of partnership in the claim which the defendant had staked or to any other relief than judgment for the return of the moneys they had advanced.

Though the total of these was only \$65, plaintiffs were given full King's Bench costs, not subject to set-off, because defendant had been guilty of flagrant deceit and falsehood in the matter.

There may be an agreement of partnership without writing notwithstanding that the partnership is intended to deal with land, and the Statute of Frauds will not avail as a defence to an action to enforce such agreement.

*Forster v. Hale*, (1800) 5 Ves. 308; *Gray v. Smith*, (1889) 43 Ch. D. 208, and *De Nicols v. Curlier*, [1900] 2 Ch. 410, followed.

*MacKissock v. Brown* . . . . 348

See COUNTY COURTS, 1.

## PLEADING.

*Amendment — Detinue — Conversion.]—The plaintiff's claim was for damages for the alleged wrongful detention of five horses. He did not allege conversion of the horses. The evidence at the trial, however, in the opinion of*

the trial Judge, showed a conversion of the horses by the defendants to their own use absolutely, that the defendants were not taken by surprise and that the amount for which the defendants could be found liable in detinue would exceed their liability for conversion.

*Held*, that the plaintiff should have leave to make all proper amendments to the statement of claim and should have judgment for the value of the five horses as in an action for conversion of them to his own use.

*McCutcheon v. Johnson* . . . 559

See ELECTION PETITION, 4.

See PRACTICE, 2.

See REAL PROPERTY ACT, 2.

See VENDOR AND PURCHASER, 9.

### **POOL ROOMS.**

See MUNICIPALITY, 1.

### **POSSESSION.**

See TRESPASS.

### **POSTPONEMENT OF TRIAL.**

See CRIMINAL LAW.

### **POWERS OF JUDGE.**

See ELECTION PETITION, 1.

### **POWERS OF LICENSE COMMISSIONERS.**

See LIQUOR LICENSE ACT.

### **PRACTICE.**

1. *Judge rescinding his own order—Jurisdiction of Local Judge of the King's Bench—Jurisdiction of Referee—King's Bench Act, Rules 27 (b) and 34—Substantive*

*application on new material.*—The Local Judge of the King's Bench at Brandon made an order, on notice to the defendants, striking out their defence for refusal to answer certain interrogatories. After the order was taken out, but before plaintiff had signed judgment upon it, the defendants delivered answers to the interrogatories. Plaintiff having signed interlocutory judgment under the order, defendants moved before the Local Judge to set aside the judgment and for leave to file a new statement of defence, when the Local Judge made the order asked for, against which plaintiff appealed.

*Held*, that the defendants' application was not in the nature of an appeal from the first order or of an application to vary or rescind it, and therefore, did not come within paragraph (b) of Rule 27 of the King's Bench Act, but was a substantive application on fresh material which the Local Judge had jurisdiction to entertain, and that he was right in making the order appealed from.

*Douglas v. Canadian Northern Railway* . . . 490

2. *Pleading—When action at issue—Amendment of pleading—King's Bench Act, Rule 301—Notice of trial.*—*Held*, by the Referee, following *Brown v. Telegram Printing Co.*, (1910) 21 M.R. 775, that, if the plaintiff amends his statement of claim after the action is at issue and before notice of trial, he opens up the pleadings and is not entitled to give notice of trial until after the lapse of ten days from the time of such amendment or from



the time of the filing of an amended defence if such is filed within the eight days allowed.

On appeal to a Judge in Chambers,

*Held*, that it could not be said that the Referee was wrong in the view he took of what was decided by the Court of Appeal in *Brown v. Telegram Printing Co.*

*Pitura v. Haney* . . . . . 753

3. *Sequestration—Judgment for recovery of costs—King's Bench Act, Rule 710, Form No. 147—Contempt—Discretionary order.*—

1. A judgment for the recovery of costs is not equivalent to an order to pay money within the meaning of Rule 710 of the King's Bench Act, and the judgment creditor is not entitled under that Rule to a writ of sequestration against the judgment debtor to recover the amount.

*Hulbert v. Cathcart*, [1894] 1 Q.B. 244, and *Re Oddy*, [1906] 1 Ch. 93, followed.

2. Rule 710 applies only to cases where a party is ordered to pay money to some person or into court on or before a specified time, but not to an ordinary judgment whereby the plaintiff is adjudged entitled to "recover" money from the defendant.

In other words, it provides an extraordinary remedy where a party has so disobeyed an order or judgment as to be practically in contempt as shown by the Form, No. 147, of a writ of sequestration appended to the Act.

*Hulbert v. Cathcart*, [1896] A.C. 470, distinguished.

3. It is within the discretion of the Judge whether or not he will

order a writ of sequestration under the Rule and, if he exercises that discretion on proper principles, the Court of Appeal should not interfere with it.

*Hulbert v. Cathcart*, [1896] A.C. 470, *supra*, followed.

*Romaniski v. Wolanchuk* . . 615

4. *Notice of trial—Jury trial—King's Bench Act, s. 59—Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178.*—If the action is not one of those which, under section 59 of the King's Bench Act, can be tried by a jury without an order of a Judge made under sub-section (b) of that section, it is irregular for a party to give notice of trial of the action for an assize at which only jury cases are heard without first obtaining such an order, and such notice so given should be set aside on application of the opposite party, unless an order for a jury is obtained and served not later than the last day for giving notice of trial for that assize.

The expression, "The Workmen's Compensation for Injuries Act," in section 59 refers to the Manitoba statute so entitled; and, though an action may appear to have been brought under a similar Act of another Province, where the cause of action arose, that does not bring it within the class of cases which may be tried by a jury without an order.

*Simonson v. Canadian Northern Railway* . . . . . 540

5. *King's Bench Act, Rule 615—Summary judgment on admission in pleadings—Right to proceed with action.*—The statement of defence in this action admitted

that a certain sum of money was due to the plaintiff in respect of his claim and was pleaded in answer to the whole claim which was for a larger amount. Plaintiff then obtained an order, under Rule 615 of the King's Bench Act, for final judgment for the amount admitted.

*Held*, that the action was at an end; and the plaintiff could not proceed to examine one of the defendants for discovery.

*United Telephone Co. v. Donohoe*, (1886) 31 Ch. D. 399, and *Andrews v. Patriotic Assurance Co.* (1886) 18 L.R. Ir. 115, followed.

*Kelly v. Kelly*, (1908) 18 M.R. 362, distinguished.

*Smith v. Simpson*..... 31

6. *Amendment — Counterclaim — Puis darrein continuance — Plaintiff filing counterclaim against defendant's counterclaim — King's Bench Act, Rules 336-340.* — Under Rule 338 of the King's Bench Act, R.S.M. 1902, c. 40, a defendant may, in a proper case, be allowed to amend his counterclaim previously filed by setting up a number of causes of action for damages alleged to have arisen since the counterclaim was filed, and such amendment should be allowed if it would not put the plaintiff in such a position that he could not be compensated in costs or otherwise: *Winnipeg v. Winnipeg Electric Ry. Co.*, (1909) 19 M.R. 279.

The plaintiffs had judgment in the action for \$3,600 with leave to bring another action for the balance of their claim, a large portion of which had only accrued since the commencement of the

action, and they could not therefore introduce their new claim in this action by amending their statement of claim.

*Held*, that these circumstances were not such that the allowance of the amendment asked for would inflict upon the plaintiffs an injustice for which they could not be compensated, because they might either set up their new claim by way of counterclaim to the defendant's counterclaim, at least to the extent of a full set off to the latter, under *Toke v. Andrews*, (1882) 8 Q.B.D. 428, and *Renton Gibbs & Co. v. Neville & Co.*, [1900] 2 Q.B. 181, or they might commence a new action and then move to consolidate the two actions or have them tried together or for such other relief as would prevent the defendants from enforcing any judgment for damages in their action pending the result of the new action if diligently prosecuted.

*Snyder v. Minnedosa Power Co.* ..... 750

7. *Third party procedure — Examination for discovery — Directions as to mode of determining questions between defendant and third party — King's Bench Act, Rules 249 (a), and 250 (a).* — 1. A defendant, who has served a third party with notice of a claim for contribution or indemnity in respect of the plaintiff's claim, cannot proceed to examine such third party for discovery, although he has filed a defence to the notice, until after an order for directions as to the mode of determining the questions arising between all the parties has been obtained by the defendant under

Rule 249 (a) of the King's Bench Act.

*Burke v. Pittman*, (1888) 12 P.R. 662; *Tritton v. Bankart*, (1887) 56 L.J. Ch. 629, and *Annual Practice*, 1913, p. 276, followed.

2. The expression "subsequent proceedings" used in sub-rule (a) of Rule 250 refers to the proceedings directed by the Court or Judge when making an order for directions under Rule 249 (a).

*Warren v. Pettingill*... 747

See COUNTY COURTS, 1.

See EXAMINATION FOR DISCOVERY.

See JURY TRIAL.

See MANDAMUS.

See PARTIES TO ACTION.

See REAL PROPERTY ACT, 2.

See SECURITY FOR COSTS.

See STAYING PROCEEDINGS.

See WILL, 2.

## PRELIMINARY OBJECTIONS.

See ELECTION PETITION, 2, 4.

## PRESUMPTION.

See MUNICIPALITY, 1.

## PRINCIPAL AND AGENT.

1. *Commission on sale of property—Vendor's refusal to complete—Consent of third person—Agent taking note for deposit in lieu of cash.*—If the lessee of a hotel has agreed to sell his interest to a purchaser ready, willing and able to complete the purchase, he will be liable to the agent who had procured the purchaser for the usual commission, although the vendor, not having been able

to obtain, on terms satisfactory to him, the necessary assent of his lessor to the proposed sale, has refused to complete it.

The taking by the agent from the intending purchaser of a promissory note for the amount of his commission in lieu of a cash deposit on the purchase, without the knowledge of the vendor, is not in itself misconduct disentitling the agent to his commission, at all events, when the vendor has not set up any misconduct on the part of the agent in respect thereof.

*Herbert v. Virian*..... 525

2. *Commission broker—Liability of principal on contracts entered into by agent in his own name—Privity of contract—Option dealings on Grain Exchange—Purchases and sales on margins for future delivery—Gambling in grain—Criminal Code, s. 231.*—The defendant, a farmer, employed the plaintiffs, members of the Winnipeg Grain Exchange, to buy and sell for him on the Exchange on commission, at different times, quantities of grain for future delivery. The transactions were what is known as dealing in options and were speculative on the defendant's part. They were carried out in accordance with the rules, customs and usages of the Exchange and the defendant knew and intended that they should be so carried out. He was so informed on every "bought" and "sold" note he received. According to those rules, customs and usages the plaintiffs became the principals in every purchase and sale for the defendant, and bought and sold

in their own name to other members of the Exchange, reporting every transaction to the defendant without giving the name of the other party to the contract.

To facilitate the settlement of the numerous dealings between the different members of the Exchange, there was a Clearing Association closely connected with it, upon which all their transactions were cleared every day by a process of set-off resulting in the different members becoming debtors or creditors of and settling with the Clearing Association for the net balances, instead of settling all matters between one another; but it did not appear that this practice was known to the defendant.

From time to time defendant placed money in plaintiffs' hands as margin to protect them against losses on his account. The plaintiffs sued for the balance due them in respect of liabilities so assumed for the defendant and for the amount of their commissions on the different transactions.

*Held*, (HOWELL, C.J.M., dissenting).

1. The plaintiffs were entitled to recover the amount of their account, although they had not in any case established any privity of contract between the defendant and the buyer or seller of the grain. The defendant was bound by the rules, customs and usages of the Exchange on which he was dealing through the plaintiffs, including any which were not known to him, provided they were not unreasonable, and the practice of clearing all transactions through the Clearing

Association was a reasonable one which was not prejudicial to him in any way, and which was binding upon him as one of such rules, customs, or usages.

*Bowstead on Agency*, 5th ed. p. 89; *Murphy v. Butler*, (1907) 18 M.R. 111, and *Van Dusen-Harrington Co. v. Jungeblut*, (1899) 77 N.W.R. 970, followed.

*Robinson v. Mollett*, (1875) L. R. 7 H.L. 802, distinguished.

2. Although the defendant did not expect that he would have to make or receive the actual delivery of the grain sold or bought, and intended to and did buy and sell as against his sales and purchases to protect himself, yet every transaction was a real and not a fictitious one, and the dealings in question were not gaming transactions within the meaning of section 231 of the Criminal Code and were not made illegal thereby. That section is only intended to apply to what are known as "bucket shop" dealings, that is, bets against the rise or fall of stocks or commodities when the pretended transactions of purchase or sale are fictitious.

*Pearson v. Carpenter*, (1904) 35 S.C.R. 380; *Forget v. Ostigny*, [1895] A.C. 318, and *Clews v. Jamieson*, (1901) 182 U.S. 489, followed.

*Richardson & Sons, Ltd. v. Beamish* . . . . . 306  
[Appealed to the Supreme Court].

3. *Liability of sub-agent for money of principal collected for agent — Privity of contract — Liquidation of solvent partnership business.*—The defendant was employed by the two partners of

a firm to act as liquidator in winding up the affairs of the firm which was solvent. In so doing he collected moneys which, to his knowledge, belonged to the plaintiff. On retiring from his employment with the firm, the defendant accounted to the partners for the moneys in his hands, in part, by paying himself the sum of \$1160 for his services. The firm objected to this charge as excessive.

*Held*, that there was no privity of contract between the plaintiff and the defendant and the latter was not liable to account to the plaintiff for the said moneys.

A claim for money received cannot in general be made upon a sub-agent who receives it only on account of the agent without any privity or relation to the principal to whose use it is paid: *Leake on Contracts*, 6th ed. 73.

*Ross v. Webb*.....503

4. *Commission on sale of land—Purchaser interested through agent's advertisement—Sale made through another agent—Absence of knowledge on part of vendor—Evidence.*—The defendant agreed verbally with the plaintiff, a real estate agent, that, if the plaintiff would bring him a purchaser for the land in question, (being a part of lot 93 in the Parish of St. Charles, 61½ acres), for \$500 per acre, \$5000 cash, and the balance on terms to be arranged, he would pay the usual commission.

Plaintiff then said he would put an advertisement in the papers and look up clients who might be willing to buy. Plaintiff inserted an advertisement in a newspaper,

giving his own name and address, and offering for sale 60 acres in St. Charles, stating the terms, but not the exact location of the land or the name of the owner.

According to the view of the evidence taken by the Judges in Appeal, this advertisement was seen by Gunn (who afterwards purchased the property from defendant), Gunn telephoned to plaintiff and learned from him the number of the parish lot and the name and address of the defendant, and then employed one Harper, another real estate agent, to negotiate a purchase directly from defendant, expressly stipulating with Harper that he should share with him the commission to be paid by defendant. Harper then went to defendant, who made the sale to Gunn and gave his receipt for \$500 deposit, but without any knowledge that the plaintiff had had anything to do with the introduction of Gunn as a purchaser. Before anything further was done to complete the sale, and before Gunn had bound himself by any writing to complete it, plaintiff saw defendant, notified him that Gunn was his client and demanded his commission. Defendant refused to pay and afterwards completed the sale to Gunn, paying the full commission to Harper, who shared it with Gunn, according to their agreement.

*Held*, that, under the circumstances, the plaintiff had "brought a purchaser" within the meaning of the contract, as his advertisement was the direct cause of the purchaser being introduced to the vendor and

that he was entitled to the commission agreed on.

*Burchell v. Gowrie, Limited*, [1910] A.C. 614, and *Stratton v. Vachon*, (1911) 44 S.C.R. 395, followed.

Knowledge on the part of the vendor that the person with whom he completes the sale was introduced by the agent is not the test of his liability to pay the commission: *Stratton v. Vachon*, *supra*.

At the trial, the plaintiff called Gunn as his witness to prove part of his case. On cross-examination Gunn made statements contradicting material parts of plaintiff's evidence.

*Held*, that plaintiff was not thereby concluded from establishing his case by other evidence, as Gunn was a hostile witness who had, for his own benefit, sought to deprive the plaintiff of his commission and was anxious to justify himself.

*Stanley Piano Co. v. Thomson*, (1900) 32 O.R. 341, followed.

*Spenard v. Rutledge*. . . . . 47

5. *Agreement for exchange of farm for city property beneficially owned by agents—Action by nominal owner for specific performance—Fraud—Costs.*—In an action for specific performance of an agreement for the exchange of city property standing in the name of the plaintiff for a farm owned by the defendant,

*Held*, that two land brokers doing business in partnership, who were the real owners of the city property referred to, were, upon the evidence, the defendant's agents for the sale of the farm, and, as such, were bound

to disclose their identity as the actual principals in the agreement made with the plaintiff; and, as they had not done so, but concealed the fact, the action should be dismissed, with costs, to be taxed free from the statutory limitation.

*Held*, also, that the agents, though not parties to the action, should be ordered to pay the defendant's costs in case they should not be paid by the plaintiff.

*Watts v. Robertson*. . . . . 534

See GUARANTY.

See INSURANCE ON LIVE STOCK.

See VENDOR AND PURCHASER, 10, 11.

### PRIORITY.

See FI. FA. GOODS.

See PARTNERSHIP, 2.

### PRIVITY OF CONTRACT.

See PRINCIPAL AND AGENT, 2.

### PROHIBITION.

*Summary trial of indictable offence—Appeal from magistrate—Secret Commissions Act, 1909, (Dom.) c. 33, s. 3.*—The applicant was tried before a Provincial Police Magistrate on a charge laid under section 3 of the Secret Commissions Act, 1909, (Dom.) c. 33, s. 3, and the charge was dismissed.

*Held*, upon the evidence, that the matter had been dealt with by the Magistrate as a summary trial of an indictable offence and not as a summary conviction proceeding, and that, as no appeal lies to a County Court Judge from the decision of a Magistrate in the former case, an order

should be made to prohibit the County Court Judge from proceeding to hear an appeal made to him by the prosecutor against the Magistrate's decision.

*Held*, also, that it was proper to make the order as soon as the prosecutor had served his notice of appeal, and it was not necessary to wait and raise the objection before the County Court Judge.

*Curlewis & Edwards' Law of Prohibition*, at pages 381-387, referred to.

*Mayor of London v. Cox*, (1867) L.R. 2 H.L. 239, followed.

*Re Buchanan*..... 943

## **PROMOTER OF COMPANY.**

See COMPANY, 5.

## **PUBLIC OFFICER.**

See DEMURRER.

## **PUIS DARREIN**

## **CONTINUANCE.**

See PRACTICE, 6.

## **PURCHASER WITHOUT NOTICE.**

See COMPANY, 1.

## **QUANTUM MERUIT.**

See ARCHITECT.

## **RAILWAY COMMISSIONERS, BOARD OF.**

See RAILWAYS, 1.

## **RAILWAYS**

1. *Railway Act, R.S.C. 1906, c. 37, s. 279—Negligence—Leaving cars on highway—Injury to persons crossing tracks—Contributory negligence—Highway crossing—*

*Order of Board of Railway Commissioners — User — Acquiescence — Infant.*] — The adult plaintiff, driving his automobile, was approaching a highway crossing of the defendants' railway. His view of the track on the right of the crossing was obstructed by a long string of box cars standing on a siding parallel to the main track and extending partly over the highway on that side. The highway, 66 feet wide, was also obstructed by some cars on the left side, one of which was partly over the highway, so that there was only a width of 25 feet between the cars. He knew that the crossing was a dangerous one and looked and listened carefully for engines or trains coming.

He did not hear any bell or whistle sounded and the cars on the siding prevented him from seeing an approaching engine. He reduced his speed to eight miles an hour and proceeded to cross the railway when his automobile was struck by a yard engine coming from the right along the main track, and practically demolished. The adult plaintiff and his daughter aged two years were both severely injured.

*Held*, that the adult plaintiff had not been guilty of negligence disentitling him to recover, as he had taken such precautions as the ordinary man in his position would take and was not bound to reduce his speed further as suggested by the trial judge.

*Held*, also, that the blocking of portions of the highway crossing by the defendants' cars, in contravention of section 279 of the Railway Act, was an act of

negligence rendering the defendant company liable in damages to the plaintiff, although the trial Judge's finding that the engine's bell and whistle had been sounded in compliance with the statute could not be reversed on the appeal.

The highway in question was opened up to the full width of 66 feet after the construction of the railway by a by-law of the City of St. Boniface showing the street on both sides of the crossing, but not the crossing itself, colored pink on a plan, followed by an order of the Board of Railway Commissioners for Canada, made upon the application of the City, and authorizing the construction of the street across the track of the defendants as shown on the plan and profile filed, and the full width of the highway at the crossing was afterwards used by the public with the knowledge and acquiescence of the defendants.

*Held*, that no further by-law of the City was necessary to constitute the street a public highway to the full width, notwithstanding the want of the pink coloring on the crossing shown on the plan.

*Re Reid and Canada Atlantic Ry. Co.*, (1905) 4 Can. Ry. Cas. at p. 275, and *C.P.R. Co. v. Toronto*, [1911] A.C. at p. 477, followed.

Verdict for the adult plaintiff for \$2,500 damages and, for the infant, \$500.

*Per* HAGGART, J.A. The adult plaintiff was guilty of such contributory negligence that he should not recover, but this would not prevent a recovery by

the infant plaintiff for her damages suffered through the defendants' negligence.

*Mills v. Armstrong*, (1888) 13 A.C. 1; *Eisenhauer v. Halifax, &c. Ry. Co.*, (1908) 12 Can. Ry. Cas. 168; *Mathews v. London St. Tram. Co.*, (1888) 58 L.J.Q.B. 12, and *Sangster v. Eaton*, (1895) 24 S.C.R. 708, followed.

*Waite v. N.E.R.*, (1858) E.B. & E. 719, not followed.

*Campbell v. Canadian Northern Ry. Co.*..... 385

2. *Railway Act, R.S.C. 1906, c. 37, s. 294 (4)*—*Fences—Animals killed on railways—Cattle at large—By-law of Municipality allowing it—Negligence or wilful act or omission of owner—Construction of statutes.*—1. As there is no definition of the word "negligence" or "wilful" in the Railway Act, R.S.C. 1906, c. 37, or in the Dominion Interpretation Act, these words in sub-section (4) of section 294 of the Railway Act should be construed according to the law of the Province in which their meaning has to be ascertained.

2. Where the by-laws of the Municipality in which the owner keeps his cattle, passed in accordance with the Municipal Act, permit the running at large of the cattle at all times, it is neither negligence nor a wilful act or omission on the part of the owner, within the meaning of sub-section (4) of section 294 of the Railway Act, for him to allow them to run at large; and, where the cattle, being thus at large, get upon the line of railway through a defective fence and are killed by a train of the railway



company at a place which is not the intersection of the right of way with a highway, the company is liable to the owner under that sub-section in damages for his loss.

*Per* PERDUE, J.A. The expression "wilful act or omission" means doing something which a reasonable man would not do, or failing to do something which a reasonable man would do, and could not be applied to the action of the plaintiff in doing what was authorized and encouraged by the law in force in the Municipality.

*Greenlaw v. Canadian Northern Ry. Co.*..... 410

3. *Railway Act, R.S.C. 1906, c. 37, s. 276—Train moving backwards over level crossing in city without any person on end car warning of its approach—Negligence—Common employment—Several tortfeasors contributing independently to the injury—Act respecting Compensation to Families of Persons Killed by Accident, R.S.M. 1902, c. 31—Lord Campbell's Act—Damages limited to amount of pecuniary loss.*—Action by the widow and administratrix of the estate of John Pettit under the Act respecting Compensation to Families of Persons Killed by Accident, R.S.M. 1902, c. 31, and under the Railway Act, R.S.C. 1906, c. 37, for damages for the death of her husband who was killed in consequence of the collision of a street car moving across the tracks of the defendants' railway, where they crossed a street of the City of Winnipeg on the level, with the end car of a freight

train of the defendants moving backwards, as it was alleged, without any person on the end car giving any warning of its approach.

The deceased was a watchman in the employ of the defendants and his duty was to watch for the approach of street cars and give the signal to stop if a train was approaching or to proceed if the railway track was clear.

At the time of the accident, which was near midnight on a very dark night, the deceased, not being able to see the approaching train, as found by the trial Judge, and having heard no whistle or bell, gave the signal for the street car to proceed, which it did, when it was struck by the end car of the train and overturned upon the deceased, killing him. The trial Judge found, upon the evidence set out in the judgment, that neither the whistle had been blown nor the bell of the engine sounded on approaching the crossing and that, if there was any person on the end car at the time, he had not given any warning to persons crossing or approaching the railway, as required by section 276 of the Railway Act.

*Held*, (1) The plaintiff could not recover at common law, for the deceased and the crew of the train were fellow servants of the defendants.

*Waller v. South Eastern Ry.*, (1863) 2 H. & C. 102; *Morgan v. Vale of Neath R. Co.*, (1865) L.R. 1 Q.B. 149, and *Lorell v. Howell*, (1876) 1 C.P.D. 161, followed.

(2) Section 276 of the Railway Act is for the protection of em-

ployees of the railway company as well as of the public: *McMullin v. N. S. Steel & Coal Co.*, (1907) 39 S.C.R. 593, and *Lamond v. G. T. R. Co.*, (1908) 16 O.L.R. 365, followed, and the plaintiff was, on the above findings, entitled to recover.

(3) The fact that the motor-man of the street car only slowed up and did not come to a full stop as he should have done before acting on the deceased's signal, although possibly creating a liability on the part of the street railway company for the result of the collision, could not prevent the recovery of full damages from the defendants.

"*The Bernina*", (1888) 13 A.C. 1, and *Burrows v. The March Gas & Coke Co.*, (1870) L.R. 5 Ex. 67, followed.

(4) The amount to be awarded for damages must be limited to the pecuniary loss to the plaintiff sustained because of the death, and the mental sufferings of the widow should not be taken into account.

*Blake v. Midland*, (1852) 18 Q.B. 93; *C.P.R. v. Robinson*, (1887) 14 S.C.R. 105, and *Lamond v. G.T.R.*, (1908) 16 O.L.R. 365, followed.

The deceased was 65 years old and was a strong healthy man, practically never ill. He was earning \$45 per month. The plaintiff, his widow, was 54 years old.

The Court reduced the damages from \$5000, the amount awarded by the trial Judge, to \$3000.

*Pettit v. Canadian Northern Ry. Co.*..... 213

4. *Negligence—Defect in system, ways, works and appliances—Failure to make flying switch caused by car coupler not working properly—Want of proper inspection of coupler.*—The plaintiff and other members of the crew of a train on the defendants' railway were engaged in an attempt to make a "flying switch" so as to place the end car on a siding without any of the other cars passing over the switch. For the success of this operation it was necessary to uncouple the end car just before it reached the switch and for the engineer then, in obedience to a signal, to apply the brakes and stop the rest of the train quickly so that the end car thus released would run into the siding of its own momentum. The plaintiff's duty was first to throw the switch and then to climb by a ladder to the top of the end car and be ready to apply the hand brake at the top so as to bring the car to a stop at the proper place on the siding. The coupling pin, however, could not be withdrawn, and, when the engineer applied the brakes, the end car with the plaintiff on top of it was suddenly checked with the rest of the train, causing the plaintiff to fall off in front of it. It ran over him and cut off one of his arms.

The jury at the trial found the defendants guilty of negligence "through lack of proper inspection."

Before the making of the attempt, two of the men had looked at the coupling in question, as well as the others on the train, and found nothing wrong with

it, but after the accident it was discovered that there was an accumulation of ice and snow in the interior of the coupling which was the reason why the man could not pull out the pin. This trouble was one that would not be noticed by any person merely looking at the outside of the apparatus.

*Held, per* PERDUE, CAMERON and HAGGART, JJ.A., that the inspection that had been made was, upon the evidence, all that was usual in such operations and was reasonably sufficient and that there was not sufficient evidence to warrant the finding of the jury that there was a lack of proper inspection causing the accident.

*Smith v. Baker*, [1891] A.C. 348; *Webster v. Foley*, 21 S.C.R. 580, and *Schwoob v. Michigan Central*, 13 O.L.R. 557, followed.

Appeal from verdict in favor of plaintiff allowed with costs, and verdict entered for defendants with costs.

*Per* HOWELL, C.J.M., and RICHARDS, J.A. The jury might have thought that it was incumbent on the defendants, under the circumstances, to have a more careful inspection, or a test made, of that particular coupling to see if it was in working order before attempting the flying switch, as the success of the attempt was dependent on the coupling working properly. If so, that was a reasonable view to take and there was sufficient evidence to justify them in their finding and the plaintiff's verdict should stand.

*Phalen v. Grand Trunk Pacific Railway*. . . . . 435

5. *Fences—Animals killed on track—Cattle guards—Railway Act, R.S.C. 1906, c. 37, ss. 254, 294—Animals at large through negligence of owner.*—The evidence showed that the plaintiff's horse was in a pasture field adjoining, on one side, the right of way of the railway and, on the other side, the road allowance crossing the railway, and it got over the road allowance on to another quarter section where it was killed either, (a) through a defect in the fence along the right of way or, (b) over that fence or through or over the other fencing on the field in which it was pasturing.

*Held*, that, in case (a), the defendants would be liable under section 254 of the Railway Act, and that, in case (b), the horse was "at large" on the road allowance before it reached the place where it was killed and the defendants would be liable under sub-section 4 of section 294 of the Act, unless negligence on the part of the owner was proved.

The statement of claim alleged that there were no cattle guards at the crossing of the road allowance as required by section 254 of the Railway Act and that the plaintiff's horse was killed through the negligence of the defendants, but no other ground of relief, and the trial Judge found that, without amendment which plaintiff's counsel refused to ask for, the plaintiff could not recover, as he had not proved that the horse got at large only by reason of the absence of cattle guards, and he non-suited the plaintiff.

*Held*, that the non-suit was

wrong as the plaintiff had made out a case on the evidence and the pleading should have been amended to fit it; but that, as the defendants had given no evidence, there should be a new trial if desired by them. Costs of the appeal to plaintiff in any event.

*Stitt v. Canadian Northern Ry. Co.*..... 43

See ARBITRATION AND AWARD, 1.

### RATIFICATION.

See COMPANY, 3, 5.

See CONTRACT, 2.

See LANDLORD AND TENANT, 3.

See VENDOR AND PURCHASER, 1, 3, 10.

### REAL PROPERTY ACT.

1. *R.S.M. 1902, c. 148, ss. 83, 113, 114—Mortgage of property under Act—Foreclosure—Jurisdiction of Court of King's Bench to foreclose—Registration in Land Titles Office.*—A mortgage of land under the New System, since it operates as a security only and not as a transfer of the land or of any estate or interest therein: *R.P. Act, s. 100*, can only be foreclosed by proceedings before the District Registrar as provided for in sections 113 and 114 of the Act, and the Court of King's Bench has no jurisdiction to make a final order or other order of foreclosure of such a mortgage, in the absence at all events of a special agreement between the parties raising equities as to title or for a conveyance of an estate in the land.

*Smith v. National Trust*, (1912) 45 S.C.R. 618, and *National Bank of Australasia v. United Hand in*

*Hand Co.*, (1879) 4 A.C. 391, followed.

The District Registrar, therefore, is justified in refusing to register a final order of foreclosure of such a mortgage presented to him for registration.

*Re Alarie and Frechette*... 628

2. "Interest" in land—Agreement to give mortgage—Caveat—Practice—Counterclaim—Defence to counterclaim—Whether plaintiff bound to file defence to counterclaim—*King's Bench Act, s. 2 (e), Rules 291-301.*—*Held, per MATHERS, C.J.K.B.*, in the Court below:

1. Notwithstanding that section 100 of the Real Property Act, *R.S.M. 1902, c. 148*, says that "A mortgage or an incumbrance under the new system . . . shall not operate as a transfer of land thereby charged or of any estate or interest therein," a person to whom the owner of the land has agreed to give a mortgage upon it has an "interest" in the land within the meaning of section 130 and may protect his right by filing a caveat, and a counterclaim filed by the caveatee in defending an action for specific performance, asking for the removal of the caveat, should be dismissed.

*Reid v. Minister of Public Works*, (1902) 2 S.R. (N.S.W.) at p. 416, *Tolley v. Byrne*, (1902) 28 Vict. L.R. at p. 101, and *Neal v. Adams*, (1885) 4 N.Z.R. S.C. 177, followed.

2. Prior to the amendments made by 3 Geo. V., c. 12, s. 3, to Rules 296, 297, 298 and 298B of the King's Bench Act, a plaintiff, against whom the defendant filed

a counterclaim, was not bound to file any defence to it, and the defendant could not sign interlocutory judgment against the plaintiff on his counterclaim for default of a defence to it.

The plaintiff in such a case could have filed a defence to the counterclaim; but, if he did not, he was considered to have denied all material allegations in it.

The word "defence" in Rules 294, 295 and 301 includes a counterclaim where there is one.

Rules 291-301 and paragraph (e) of section 2 of the Act specially considered and explained.

On appeal the Court dismissed same without calling on respondent's counsel.

*Thompson v. Yockney* . . . . 571

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## RECOVERY BACK OF MONEY PAID.

See VENDOR AND PURCHASER, 4.

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## REDEMPTION.

See VENDOR AND PURCHASER, 8.

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## REFEREE.

See PARTIES TO ACTION, 1.

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## REFEREE IN CHAMBERS, JURISDICTION OF.

See ARBITRATION AND AWARD, 2.

See PRACTICE, 1.

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## REGISTERED JUDGMENT.

*Judgments Act, R.S.M. 1902, c. 91, s. 2 (f) and s. 3—Conveyance absolute in form given as security*

*for debt—Right of grantor to surplus upon sale—Liability of grantee to judgment creditor of grantor in respect of surplus after sale—Notice—Real Property Act, R.S.M. 1902, c. 148—Fraudulent preference—Intent to prefer—What constitutes insolvency—Creditor's knowledge of the intent to prefer—Assignments Act, R.S.M. 1902, c. 8, ss. 38, 39, 40, 41, 42—Transaction having effect of preference.]—The defendant McCauley, being indebted to John Gunn & Sons and being pressed for payment, and unable to pay the debt in cash, offered the land in question in settlement of the account. This was refused and McCauley then offered the land as security for the debt. This offer was accepted and the land was transferred to the defendant Gunn, one of the firm of John Gunn & Sons, by a transfer under the Real Property Act, absolute in form, under which he obtained a certificate of title in his own name in March, 1911. In July, 1912, Gunn sold and transferred the property to a purchaser procured by McCauley and afterwards accounted to McCauley for the full amount of the proceeds after deducting the claim of John Gunn & Sons.*

The plaintiff's claim was on a judgment against McCauley for \$996.70, of which he had registered a certificate on 11th October, 1911, and he brought this action for a declaration that the transfer of the land to Gunn was fraudulent and void as against him and the other creditors of the defendant McCauley and for an order that Gunn should account for all moneys received from the

sale of the land and pay the same over to the creditors under the direction of the Court, or, in the alternative, that Gunn should account to the creditors for the amount he had paid over to McCauley out of the proceeds of the sale.

At the time of the sale by Gunn and until after he had paid over such proceeds to McCauley, he had no knowledge of the plaintiff's judgment or of McCauley's insolvency, if he was in fact insolvent at that time. There were three unpaid judgments against him aggregating \$2032.48, including those of the plaintiff and John Gunn & Sons, and he had a short time previously made a number of transfers of land to various creditors in satisfaction of their claims, but the utmost that could be inferred from the evidence, in the opinion of the trial judge, was that he was short of money and had used some of his lands as the medium of payment of his debts instead of cash.

*Held*, by the Court of Appeal, that the registration of a certificate of judgment under the Judgments Act, R.S.M. 1902, c. 91, against the "lands" of a judgment debtor who has previously conveyed land to another creditor by a transfer under the Real Property Act, absolute in form but only as security for his debt, does not constitute notice of such judgment creditor's lien, if any, on the equitable interest of the judgment debtor in the land, and the transferee, on subsequently selling the land and realizing a surplus, is not bound to search in the Land Titles office for judgments registered against the

transferor, but may safely pay such surplus over to him, unless he has had actual notice of the registration of the judgment.

*Pierce v. Canada Permanent*, (1895) 25 O.R. 671, 23 A.R. 516, followed.

*Held*, also by CURRAN, J., in the Court below.

1. The evidence fell short of showing that, when McCauley transferred the land to Gunn, he was in insolvent circumstances within the meaning of that expression as defined in *Davidson v. Douglas*, (1868) 15 Gr. at p. 351.

2. As this action had not been commenced within 60 days after the impeached transaction and there had been no assignment under the Assignments Act, R.S. M. 1902, c. 8, neither section 40 nor section 41 of that Act could be invoked by the plaintiff.

3. Section 42 of the Act applies only to cases arising under sections 40 and 41, and, therefore, its provisions could not be considered in this case.

4. The plaintiff could not succeed under section 38 of the Act as he had failed to prove that the transfer in question had been made "with intent to defeat, hinder, delay or prejudice" the creditors of McCauley or any of them, or that Gunn had participated in such intent.

5. The plaintiff could not succeed under section 39 as he had failed to prove either the insolvency of McCauley at the time or his intent to prefer, or participation by Gunn in such intent.

6. Although the impeached transaction had the effect of preferring Gunn & Sons to the other creditors, that fact alone was not

sufficient to avoid it under either section 38 or section 39, where the words "which have such effect" do not appear.

7. To constitute a fraudulent preference to a creditor under section 39 of the Act, there must be a concurrence of intent on the part of both debtor and creditor: *Parker on Fraud*, pp. 163, 170, and *Hepburn v. Park*, (1884) 6 O.R. 472.

*Schwartz v. Winkler*, (1901) 13 M.R. 493; *Stephens v. McArthur*, (1890) 6 M.R. 497, and *Codville v. Fraser*, (1902) 14 M.R. 12, distinguished, on the ground of subsequent changes in the statutes in force when they were decided.

8. Even if a presumption of knowledge by the creditor of the debtor's insolvency arises against the creditor for any reason, it is open to him to rebut it by evidence as had been done in this case.

*Robinson v. McCauley* . . . 781

## REGISTRATION OF DEEDS.

*Registry Act, R.S.M. 1902, c. 150, ss. 27, 49, 50—Deposit of mortgage with registrar—Requirements for registration—Indorsement of certificate by registrar.*—The policy of the Legislature in enacting the Registry Act, R.S. M. 1902, c. 150, was to enable persons, *bona fide* holding instruments affecting land under the Old System, to protect themselves by their own diligence; and the provisions of the Act should not be construed so as to deprive a person of a priority obtained by registration because of any neglect or carelessness of the registrar, unless it appears certain

that such was the intention of the Legislature.

Considering, therefore, that both sections 27 and 49 of the Act provide that a mortgage or other instrument shall be registered by producing it to, or depositing it with, the registrar, with the necessary affidavit of execution, section 50 should not be construed so as to make the indorsement of the certificate thereon, required to be made by the registrar, a pre-requisite for registration, and, in case the registrar neglects for some days to make such indorsement, another instrument registered prior to the time when such indorsement was actually made, but subsequent to the date when the first instrument was deposited with him for registration, does not acquire priority over the latter.

*Harris v. Rankin*, (1887) 4 M.R. 115, in so far as it decided what constitutes registration, is still applicable to such a case as the present notwithstanding the additional provisions since made by section 50 of the Act.

*Siemens v. Dirks* . . . . . 581

## RE-OPENING TRIAL.

See SECURITY FOR COSTS.

## REPRESENTATION.

See WARRANTY.

## RESCINDING ORDER.

See ELECTION PETITION, 1.

See PARTIES TO ACTION, 1.

See PRACTICE, 1.

## RESCISSION OF CONTRACT.

See VENDOR AND PURCHASER, 7.

**RES JUDICATA.**

See WINDING-UP OF COMPANY, 2.

**REVOCAION OF LICENSE.**

See MUNICIPALITY, 1.

**RIGHT OF ACTION.**

See EXECUTORS AND ADMINISTRATORS.

See LIMITATION OF ACTIONS, 2.

**RULE AGAINST PERPETUITIES.**

See WILL, 1.

**SALE OF GOODS.**

See INSURANCE ON LIVE STOCK.

**SALE OF SHARES.**

See COMPANY, 1, 3.

**SEAL OF CORPORATION.**

See LANDLORD AND TENANT, 3.

**SECURITY FOR COSTS.**

*Application for additional security — Amendment — Practice — Costs — Trial, re-opening of.*—At the opening of the trial, defendant applied for an order that the plaintiff do furnish additional security for the costs of the action on an affidavit showing that the costs so far incurred far exceeded the amount paid into Court (\$200) by the plaintiff under praecipe order.

The trial Judge reserved his decision on the application till after the trial.

At the close of the case the plaintiff asked leave to amend the statement of claim by introducing new matter to which the defendant might wish to plead and upon which evidence might be required.

The Judge reserved his decision upon this motion also, and, afterwards, without giving judgment in the action,

*Held*, (1) The plaintiff should furnish additional security for costs to the amount of \$400, if paid into Court, or by bond for \$800.

(2) The plaintiff should have leave to make the amendment asked for, as it appeared to be necessary in determining the real question or issues between the parties, and would occasion no injury or prejudice to the defendant for which costs would not compensate him. *Lee v. Gallagher*, (1905) 15 M.R. 677, followed.

Defendant to have the usual time to file his defence to the amended statement of claim.

The trial to be re-opened, if necessary, to hear any evidence bearing upon the new issue raised by the amendment and any defence thereto.

All costs occasioned to the defendant by reason of the amendment to be costs in the cause to the defendant in any event.

*The Scandinavian American National Bank v. Kneeland*. 480

**SEQUESTRATION.**

See PRACTICE, 3.

**SERVICE OF PETITION.**

See ELECTION PETITION, 1, 4.

**SERVICE OUT OF JURISDICTION.**

See PARTIES TO ACTION, 1.

**SET-OFF.**

See ASSIGNMENT OF CHOSE IN ACTION.



**SEVERAL TORT FEASORS.***See RAILWAYS, 3.***SHERIFF.***See FI. FA. GOODS.***SIMPLEX COMMENDATIO.***See MISREPRESENTATION.***SLANDER.***See JURY TRIAL, 4.***SOLICITOR AND CLIENT.***Costs—Taxation—Law Society Act, R.S.M. 1902, c. 95, s. 65—Commission or percentage—Fees for services in litigious business.]—*

A solicitor cannot, in the absence of a special agreement such as is provided for by section 65 of the Law Society Act, R.S.M. 1902, c. 95, recover against his client, for work in connection with an action in the Court, any fees or charges other or greater than those set forth in the tariff of costs promulgated under the King's Bench Act, and the taxing officer, in fixing "an allowance for proceedings taken by the solicitor to save costs or compromise actions," although given a wide discretion as to the amount, should be guided by the analogy of the tariff and allow only a fee which would be in some measure commensurate with what is usually taxed in respect of items of similar or greater importance, such as counsel fees, having regard to the time expended, the skill exercised in the negotiations, the success achieved, and, in this case, to the very liberal sums allowed in respect of other items of the bill which were not contested on the appeal.

Though the amount involved in the action should also be considered, yet the fee allowed should not be in any way fixed on a percentage or commission basis as the sum of \$3,500 allowed in this case must have been.

*Re Johnston*, (1901) 3 O.L.R. 1, and *In re Attorneys*, (1876) 26 U.C.C.P. 495, distinguished on the ground that they had no reference to the remuneration of a solicitor for services in litigious business.

Appeal allowed with costs and matter referred back to the taxing master for reconsideration with a direction to fix a fee or allowance on settlement upon the above principles.

*Re Phillipps and Whittle*. . . 92**SPECIFIC PERFORMANCE.***See PRINCIPAL AND AGENT, 5.**See VENDOR AND PURCHASER, 3, 5, 6, 10, 11.***STATUTE OF FRAUDS.**

*Collateral verbal agreement—Conveyance of land in consideration of promise by grantee to support grantor's son for life—Remedy in case grantee refuses to carry out promise—Vendor's lien—Agreement not to be performed within a year—Express trust—Annuity—Charge on land—Parol evidence—Fraud.]—*According to the trial Judge's findings of fact, plaintiff purchased and had conveyed to the defendant, one of his sons, a house in Winnipeg in consideration of the verbal promise of the defendant that he would thereafter keep and maintain for the rest of his life a brother who was mentally deficient, incapable of

doing anything for himself, and who was wholly a charge upon the father's bounty. The defendant then took charge of the brother; but, after a few months, refused any longer to do so and the plaintiff had to make other arrangements for him.

*Held*, (1) The defendant's promise was not a contract for sale of lands or of any interest in or concerning lands, but was a collateral agreement which might be proved by parol evidence and which was not within the 4th section of the Statute of Frauds.

*Smith v. Ernst*, (1912) 22 M.R. 363, and *Morgan v. Griffith*, (1871) L.R. 6 Ex. 70, followed.

(2) The defendant's agreement was not within that part of the 4th section relating to agreements not to be performed within one year, because it would not necessarily, by its terms, endure beyond a year.

*Slater v. Smith*, (1853) 10 U.C.R. 630, and *McGregor v. McGregor*, (1888) 21 Q.B.D. 424, followed.

(3) Even if the defendant's agreement was within the statute, as the consideration for it had been completely executed by the plaintiff, the Court would, under the circumstances, enforce the contract notwithstanding the statute.

*Halleran v. Moon*, (1881) 28 Gr. 319, and *Kinsey v. National Trust*, (1904) 15 M.R. 32, followed.

(4) If it could be held that the transaction amounted to the creation of an express trust on which the defendant was to hold the land, the 7th section of the Statute of Frauds could not be

invoked to enable the defendant to perpetrate a fraud by keeping the land and refusing to perform the trust.

*In re Duke of Marlborough*, [1894] 2 Ch. 133; *Smith v. Ernst*, (1912) 22 M.R. at pp. 377, 378, and *Gordon v. Handford*, (1906) 16 M.R. 292, followed.

(5) The plaintiff was entitled to a vendor's lien on the house for the amount he had paid for it, less such sum as the defendant should be allowed for the support and maintenance of the brother during the time he resided with the defendant, such amount to be ascertained on a reference to the Master if not agreed upon.

*Cunningham v. Moore*, (1895) 1 N.B.Eq. 116, and *Paine v. Chapman*, (1857) 6 Gr. 338, followed.

(6) When A conveys land to B in consideration of B's agreement to pay an annuity to C, the Court will, upon default in payment, declare the annuity to be charged upon the land, although no express charge has been created, and decree a sale of the land to realize the charge.

*Dawson v. Dawson*, (1911) 23 O.L.R. 1, followed.

*Zdan v. Hruden*, (1912) 22 M.R. 387, explained.

Judgment for payment by defendant of the balance to be found due and for sale of the land if not paid with all costs within a month thereafter.

*Spencer v. Spencer* . . . . . 461

See LANDLORD AND TENANT, 3.

See PARTNERSHIP, 3.

See VENDOR AND PURCHASER, 1, 6, 10, 11.

**STATUTES.**

*Act Respecting Compensation  
to Families of Persons  
Killed by Accident, R.S.M.*  
1902, c. 31..... 213

See RAILWAYS, 3.

*Arbitration Act, 1 Geo. V, c. 1,  
s. 6.....* 225, 912

See ARBITRATION AND  
AWARD, 2.

See CONTRACT, 3.

*Assignments Act, R. S. M.*  
1902, c. 8, ss. 8, 9..... 590

See FI. FA. GOODS.

s. 27..... 5

See PARTNERSHIP, 2.

ss. 29, 31..... 415

See COMPANY, 1.

ss. 38, 39, 40, 41, 42..... 781

See REGISTERED JUDGMENT.

*Charitable Associations Act,  
R.S.M. 1902, c. 18.....* 641

See LANDLORD AND TENANT, 3.

*County Courts Act, R.S.M.*  
1902, c. 38, s. 72..... 815

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s. 330..... 553

See COUNTY COURT, 2.

*Criminal Code, s. 231.....* 306

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*Devolution of Estates Act,  
R.S.M. 1902, c. 48, s. 22..* 763

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s. 25, added by 5 and 6 Edw.  
VII, c. 21, s. 1..... 120

See VENDOR AND PURCHASER, 6.

*Dominion Elections Act, R. S.  
C. 1906, c. 6, ss. 14, 18, 269, 542*

See ELECTION PETITION, 4.

*Dominion Controverted Elec-  
tion Act, R.S.C. 1906, c. 7,  
ss. 6, 11, 12, 17, 18, 19....* 542

See ELECTION PETITION, 4

*Dominion Winding-Up Act,  
R.S.C. 1906, c. 144, s. 3...*  477

See WINDING-UP OF COMPANY. 2.

ss. 6, 11..... 871

See WINDING-UP OF COMPANY, 1.

*Evidence Act, R.S.M. 1902,  
c. 57, s. 39.....* 483

See NEGLIGENCE, 2.

*Executions Act, R.S.M. 1902,  
c. 58, s. 25.....* 590

See FI. FA. GOODS.

*Judgments Act, R.S.M. 1902,  
c. 91, s. 2 (f) and s. 3....* 781

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*King's Bench Act, R.S.M.*  
1902, c. 40, s. 2 (e)..... 571

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s. 39 (f)..... 740

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ACTION.

s. 59 (b)..... 23, 408, 537, 539

See JURY TRIAL, 1, 2, 3, 4.

s. 59..... 540

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s. 90..... 815

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*Rules 27 (b) and 34.....* 490

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*Rule 40.....* 760

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*Rule 201 (g).....* 84

See PARTIES TO ACTION, 1.

<i>Rules 249 (a) and 250 (a)</i> . . . 747	ss. 66, 68, 76A . . . . . 361
<i>See PRACTICE, 7.</i>	<i>See LOCAL OPTION BY-LAW, 2.</i>
<i>Rules 291, 293</i> . . . . . 740	<i>Lord Campbell's Act</i> . . . . . 213
<i>See ASSIGNMENT OF CHOSE IN ACTION.</i>	<i>See RAILWAYS, 3.</i>
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<i>Rule 301</i> . . . . . 753	ss. 33, 34, 35 . . . . . 678
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<i>See PARTIES TO ACTION, 1.</i>	<i>See ELECTION PETITION, 2.</i>
<i>Rule 345</i> . . . . . 243	s. 8 (aaa) . . . . . 832
<i>See COMPANY, 2.</i>	<i>See THRESHERS' LIEN.</i>
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<i>Rule 615</i> . . . . . 31	<i>Municipal Act, R.S.M. 1902, c. 116, ss. 98, 99, 200, 376</i> . 361
<i>See PRACTICE, 5.</i>	<i>See LOCAL OPTION BY-LAW, 2.</i>
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<i>Law Society Act, R.S.M. 1902, c. 95, s. 65</i> . . . . . 92	
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<i>See LOCAL OPTION BY-LAW, 1.</i>	

- Partnership Act, R.S.M.*  
1902, c. 129..... 10  
See PARTNERSHIP, 1.
- s. 26..... 815  
See COUNTY COURT, 1.
- Railway Act, R.S.C.* 1906,  
c. 37, s. 192, as amended by  
8 and 9 *Edw. VII*, c. 32, s. 3 268  
See ARBITRATION AND AWARD, 1.
- ss. 254, 294..... 43  
See RAILWAYS, 5.
- s. 276..... 213  
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- s. 279..... 385  
See RAILWAYS, 1.
- s. 294 (4)..... 410  
See RAILWAYS, 2.
- Real Property Act, R.S.M.*  
1902, c. 148..... 781, 128  
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- ss. 83, 113, 114..... 628  
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- Registry Act, R.S.M.* 1902,  
c. 150, ss. 27, 47, 50..... 581  
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- Secret Commissions Act, 1909*  
(Dom.), c. 33, s. 3..... 943  
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- Special Survey Act, R.S.M.*  
1902, c. 158, as amended by  
10 *Edw. VII*, c. 62..... 136  
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- Statute of Frauds*..... 641, 348  
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1, 3, 6, 10, 11.
- Threshers' Lien Act, R.S.M.*  
1902, c. 167, ss. 2-8..... 832  
See THRESHERS' LIEN.
- Winding-Up Act, R.S.C.*  
1906, c. 144, s. 3..... 477  
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- Winnipeg Charter, s. 703 (28)* 296  
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- Workmen's Compensation for*  
*Injuries Act, R.S.M.* 1902,  
c. 178..... 540  
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- 13 *Eliz. c. 5*..... 769  
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7 and 8 *Edw. VII*, c. 12, s. 1  
245, 25  
See COMPANY, 2  
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- 9 *Edw. VII*, c. 31, s. 10..... 24  
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## STATUTES, CONSTRUCTION OF.

- See ARBITRATION AND AWARD, 1.  
See HIGHWAYS.  
See LOCAL OPTION BY-LAW, 2.  
See RAILWAYS, 2.  
See THRESHERS' LIEN.

## STAYING PROCEEDINGS.

Judgment for plaintiff—Counterclaim pending—Delay in bringing counterclaim to trial—Practice.—As a general rule when the plaintiff has judgment in his favor, but the defendant's counterclaim stands over for trial,

proceedings on the judgment will be stayed until the counterclaim has been disposed of; but, when the plaintiff's judgment has been outstanding for a year or more and the defendant has not brought on his counterclaim for trial and is unwilling to undertake to bring it on at the next sittings of the Court, there should be no further stay of proceedings.

*Snyder v. Minnedosa Power Co.*.....588

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See CONTRACT, 3.

### **STREET RAILWAY.**

See NEGLIGENCE, 1, 2.

### **STRIKING OUT DEFENCE.**

See EXAMINATION FOR  
DISCOVERY.

### **SUBPOENA.**

See EXAMINATION FOR  
DISCOVERY.

### **SUBROGATION.**

See INSURANCE ON LIVE STOCK.

### **SUBSTITUTED SERVICE.**

See ELECTION PETITION, 1.

### **SUMMARY JUDGMENT.**

See PRACTICE, 5.

### **SUMMARY TRIAL.**

See PROHIBITION.

### **SURPLUS AFTER SALE.**

See REGISTERED JUDGMENT.

### **TAXATION.**

See SOLICITOR AND CLIENT.

## **THIRD PARTY PROCEDURE.**

See PRACTICE, 7.

## **THRESHERS' LIEN**

*Threshers' Lien Act, R. S. M.*  
1902, c. 167, ss. 2-8—*Construction of statutes—Interpretation Act, R. S. M.* 1902, c. 89, s. 8 (aaa)—*Fixed price or rate of remuneration for threshing—Right of thresher to break into barns or granaries in order to seize and sell grain—Liability of thresher for loss of grain by theft after seizure—Costs.*  
—1. In view of paragraph (aaa) of section 8 of the Manitoba Interpretation Act, R.S.M. 1902, c. 89, the provisions of the Threshers' Lien Act, R.S.M. 1902, c. 167, should be fairly and liberally construed so as to insure the attainment of its object.

*Elsom v. Ellis*, (1910) 16 W.L.R. 373, not followed.

2. Where the thresher agreed to do the work at the same rate per bushel as another thresher in the neighborhood charged, as to which evidence was given, there was "a fixed price or remuneration" within the meaning of section 2 of the Act, for "*Id certum est quod certum reddi potest.*"

*Delbridge v. Pickersgill*, (1912) 21 W.L.R. 285, dissented from.

3. The right of a thresher under the Act is not merely a passive lien, but he may seize and sell the grain to realize his claim.

*Prinneveau v. Morden*, (1913) 11 D.L.R. 272, not followed.

4. When the owner of the grain threshed stores it on the premises in barns or granaries which he locks or boards up, and then goes

away leaving the premises vacant, the thresher who has seized the grain in exercise of his right under the Act is justified in breaking into the barns or granaries in order to take away and sell the grain, for section 8 of the Act requires that he must sell within 30 days after the right of retention is asserted, otherwise the lien would be lost.

Cases cited in *Maxwell on Statutes*, 3rd ed. 502, referred to.

5. A thresher who has exercised his right of retention under the Act is in the position of a bailee and, in the absence of negligence on his part, is not liable to the owner for grain stolen from the barns or granaries after the seizure.

*Finucane v. Small*, (1795) 1 Esp. 315, followed.

6. When the defendant succeeds on the main question involved in the action and the plaintiff succeeds on a small and almost undefended item in his claim, the defendant should have his costs of the action and the plaintiff his costs of the issue in respect of which he succeeded.

*Forster v. Farquhar*, [1893] 1 Q.B. 564, and *Lund v. Campbell*, (1885) 14 Q.B.D. 821, followed.

*Hill v. Stait* ..... 832

### **TIME.**

See ELECTION PETITION, 1, 2.

See PARTIES TO ACTION, 1.

### **TITLE TO LAND.**

See VENDOR AND PURCHASER, 5.

### **TRANSFER OF ACTION TO KING'S BENCH.**

See COUNTY COURT, 1.

### **TRANSFER OF SHARES.**

See COMPANY, 1, 3.

### **TRESPASS**

*Possession under lease—Execution of lease by Company—Lease for grazing purposes—Permit to cut and take hay.*—1. If A has taken possession of land under a lease executed on behalf of a company owning the land by a person describing himself as Land Commissioner of the Company, the validity of his lease cannot be disputed by B, whose only claim is under a permit to cut and take hay signed by the same person on behalf of the company.

2. Under a lease, of which the *habendum* is, "to have and to hold . . . . . for grazing purposes only for three years," the lessee is, nevertheless, entitled to peaceable possession and may maintain an action of trespass against one who enters upon the land under a prior permit to cut and take hay which has been legally cancelled.

*West v. Mayland* ..... 488

### **TRIAL.**

See CRIMINAL LAW.

### **ULTRA VIRES.**

See COMPANY, 2.

See MUNICIPALITY, 1.

See WINDING-UP OF COMPANY, 1.

### **UNDUE INFLUENCE.**

See GUARANTY.

### **USER.**

See RAILWAYS, 1.

**VENDOR AND PURCHASER**

1. *Statute of Frauds—Memorandum in writing signed by defendants but not showing name of plaintiff or his agent as purchaser—Ratification—Nominal purchaser.*—1. The Statute of Frauds prevents the enforcement by A, in a suit against B, for specific performance of an agreement signed by B, to sell land to C, in a case where C was not acting as A's agent in procuring the agreement, and did not know of the existence of A at the time.

2. In such a case C could not profess to have been acting on A's behalf, and A could not therefore ratify or take advantage of the contract as against B.

*Keighley v. Durant*, [1901] A.C. 240, followed.

3. If the agreement had named A as purchaser she might have been entitled to enforce it although she was not interested in the purchase for herself, but only as trustee for the real purchaser.

*Ecroyd v. Rodgers* ..... 633

2. *Agreement of sale of land—Cancellation of agreement—Notice of cancellation—Abandonment of purchase—Laches.*—1. A notice of cancellation of an agreement of sale after thirty days is ineffectual if the agreement provides for a month's notice.

*Le Neveu v. McQuarrie*, (1907) 21 M.R. 399, followed

2. A purchaser under an agreement of sale of land who has made only the initial payment and is in default in his subsequent payments for over four years, has paid no taxes on the land and, upon being afterwards served

with the statement of claim in an action for cancellation, writes the plaintiff a letter stating that he had been unable to make payments and offering to sign any papers required "to place you in possession," should be held to have abandoned his purchase.

*Hicks v. Laidlaw*, (1912) 22 M.R. 96, followed.

*Cornwall v. Henson*, [1900] 2 Ch. 298, distinguished.

3. The fact that the agreement provided for cancellation by notice and that such notice was not properly given does not preclude a finding of abandonment.

Judgment for a declaration that the defendant had no longer any interest in the land and an order discharging the registration of the agreement and a caveat filed by the defendant thereunder.

*Fox v. Reid* ..... 152

3. *Specific performance—Authority to agent—Misrepresentation of name of purchaser—Ratification—Statute of Frauds.*—Plaintiff claimed specific performance of an agreement by defendant to sell him a farm. The agreement was in the form of a receipt for \$100 on account of the purchase money, providing for payment of the balance, \$2,300, in cash five weeks afterwards and signed by one Arundel as agent of defendant.

The defendant disputed Arundel's authority to make the sale to the plaintiff. He also contended that he would not have sold to the plaintiff if he had known who the purchaser was and that the plaintiff had fraudulently concealed this from him.



Arundel was a solicitor practising in Stonewall and had generally acted in that capacity for the defendant who lived in Winnipeg; but the land in question had not been listed with him for sale nor was he, prior to the telephone conversation below mentioned, in any sense the defendant's agent.

At the request of one Nelson sent by the plaintiff, who was a resident of Stonewall, Arundel called up the defendant on the telephone and got from him the information that the land was for sale and his lowest price and terms—namely \$2,400 cash.

During this conversation, at which Nelson was present, defendant asked who the purchaser was and Arundel said: "It is a Winnipeg man," in consequence of an ambiguous answer made by Nelson to the question when it was repeated to him. Shortly afterwards the plaintiff called upon Arundel, paid the \$100 and got the receipt above referred to. Arundel the same evening (Saturday) called defendant on the telephone and told him the land was sold, that he had received the \$100 and that the balance was to be paid in cash within a month, but did not mention the purchaser's name. Defendant agreed to the terms and did not ask who the purchaser was. A few minutes later, defendant called up Arundel and asked who the purchaser was and was told it was the plaintiff. To this defendant made no reply except a surprised exclamation "Oh!" and it was not until the following Monday morning that he called up Arundel and repudiated the

sale and said he would not sell to a Stonewall man. No reason was shown why the defendant should not have been as willing to sell to the plaintiff as to anyone else, beyond the fact that he had some months previously offered the land to the plaintiff for \$3,000 and that the plaintiff had refused to purchase at that price.

Upon the evidence the trial Judge decided that he could not find that the plaintiff knew that the defendant would not sell to him or that there was any personal reason why the plaintiff should be objectionable to the defendant as a purchaser, or that the plaintiff had been guilty of any fraud or deception inducing the contract or that the defendant would not have entered into it had he been aware that the plaintiff was the purchaser.

*Held*, on appeal from the decision of Curran, J., at the trial, adopting his findings of fact as to what the defendant had done:

(1) There was not sufficient evidence to show that the defendant had given Arundel any authority to enter into the contract of sale as his agent and to bind him by signing the receipt relied on, or to do more than to communicate to the person making the inquiry the price and terms on which he was willing to sell.

*Hamer v. Sharp*, (1874) L.R. 19 Eq. 108; *Bradley v. Elliott*, (1906) 11 O.L.R. 398; *Prior v. Moore*, (1887) 3 T.L.R. 624, and *Harvey v. Facey*, [1893] A.C. 552, followed.

(2) The defendant's acts did not amount to a ratification of the act of Arundel in signing a

document containing, not only a receipt for the \$100, but also a binding contract of sale. This was the act which required ratification in this case, and to establish ratification there must be clear adoptive acts or acquiescence equivalent thereto, accompanied by full knowledge of all the essential facts. The defendant knew that Arundel had assumed to sell the land and had given a receipt for the deposit, but not that he had assumed to sign a contract of sale binding on him.

(3) The Statute of Frauds, therefore, constituted a good defence to the action which should be dismissed with costs.

*Per PERDUE, J. A.* Under the circumstances, the misrepresentation made to the defendant, although innocently, by Arundel, that the purchaser was a Winnipeg man, was material and he should not be bound by the assent he gave to the sale before the truth had been communicated to him. After he learned that the plaintiff was the purchaser, he did nothing in the way of ratification and had a right to repudiate the sale within a reasonable time, which he had done.

*Fry on Specific Performance*, 5th ed., pp. 107, 108, followed.

*Good v. Bescoby* . . . . . 603

4. *Cancellation of agreement of sale—Construction of contract—Equitable relief—Waiver—Recovering back money paid.*—A notice of cancellation of an agreement of sale of land after default should be construed strictly; and, in order to effectually cut out all interest of the purchaser, it must

closely comply with the power of cancellation contained in the agreement: *Le Neveu v. McQuarrie*, (1907) 21 M.R. 399; *Mills v. Marriott*, (1912) 3 W.W.R. 841; *Canadian Fairbanks v. Johnston*, (1909) 18 M.R. 589.

The Court will relieve a purchaser against a mere provision for forfeiture on default if there has been no unreasonable delay, and if there is nothing in the *express stipulations* between the parties, the nature of the property or the surrounding circumstances which would make it inequitable to interfere with or modify the legal right of the vendor: *B.C. Orchard v. Kilmer*, (1913) 3 W.W.R. 1119, (*Privy Council judgment*), and *Roberts v. Berry*, (1853) 3 De G.M. & G. 284.

The agreement of sale in this case provided that, on default in payment, "the vendor shall be at liberty to determine and put an end to this agreement, and to retain any sum or sums paid thereunder as and by way of liquidated damages . . . by mailing in a registered package a notice signed by or on behalf of the vendor intimating an intention to determine this agreement, addressed, etc., and if, at the end of thirty days from the time of mailing thereof, the amount so due be not paid," then the purchaser shall deliver possession of the property at the expiration of the thirty days, "and, if the said notice be one of intention to determine this agreement, this agreement shall, at the expiration of the said thirty days, become void and be at an end, and all rights and interests hereby cre-

ated or then existing in favor of the purchasers or derived under this agreement shall thereupon cease and determine, and the lands hereby agreed to be sold shall revert to and revest in the vendor . . . without any suit or legal proceedings to be brought or taken and without any right on the part of the purchasers for any compensation for moneys paid under this agreement." After default, the vendor gave a notice to the purchasers which the trial Judge found to be in strict conformity with this power, but the purchasers made no move towards making good their default and did nothing to assert their right to redeem until nearly six months afterwards.

*Held*, that the vendors' notice was, under the circumstances, effectual to cancel the agreement and that he was entitled to a declaration that it had been cancelled and was null and void, and that the lands had reverted and revested in him free from the claim of the purchasers and to an order vacating and discharging the caveat they had registered against the land under the agreement, with costs of the action to the vendor.

*Canadian, Fairbanks v. Johnston*, (1909) 18 M.R. 589, distinguished.

*Held*, also, that the vendor had not waived the forfeiture by receiving and retaining, before the expiration of the thirty days, further payments on account of the purchase money.

*Keene v. Biscoe*, (1878) 8 Ch. D. 201, followed.

The vendor in this case having

offered to pay back the moneys received on account, the amount was ordered to be set off against his costs and any excess to be paid to the purchasers.

*Massey v. Walker* . . . . . 563

5. *Vendor unable to make title—Damages for loss of bargain—Specific performance—Cy-pres doctrine.*—Defendant, a widow, entered into an agreement to sell the land in question to the plaintiff, believing that she had a right to sell it. On discovering that the land belonged to the estate of her deceased husband and that she could not make title to it, she at once notified the plaintiff to that effect.

*Held*, that damages could not be awarded to the plaintiff for the loss of his bargain in lieu of specific performance.

*Bain v. Fothergill*, (1873) L.R. 7 H.L. 158, followed.

*Held*, also, that the plaintiff was not entitled to an order that the defendant should convey the interest she had with an abatement of the purchase money as, until the debts of the estate were paid, it would be impossible to ascertain what that interest was.

*Meighen v. Couch* . . . . . 117

6. *Specific performance—Statute of Frauds—Part performance—Administration of estates—Devolution of Estates Act, R.S.M. 1902, c. 21, s. 25 added by 5 & 6 Edw. VII, c. 21, s. 1.*—Specific performance of an agreement contained in certain letters signed by one of the two defendants, who were the administrators of an estate, to sell land belonging to

the estate of the deceased to one Donald McInnis refused for the following reasons:

1. The letters did not definitely fix the amounts of the deferred payments, or the times when such payments were to be made, the expression used being "the balance (\$16,000) to be paid out of the crop from the farm at the rate of about \$2,500 a year."

2. The offer to sell had not been signed by the other administrator and he had not in any way authorized the sale.

*Gibb v. McMahon*, (1905) 9 O.L.R. 522, 37 S.C.R. 362, followed.

3. For these reasons the Statute of Frauds would prevent the enforcement of the alleged contract.

4. The offer to sell was not made to the plaintiff company or accepted by it or on its behalf and it was in no way obligated by, or concerned in, the proposed sale to McInnis.

5. Under section 25 of the Devolution of Estates Act, R.S.M. 1902, c. 21, added by section 1 of chapter 21 of 5 & 6 Edw. VII, as there was a non-concurring adult interested, viz. the daughter of the deceased, a sale, even if made by both the administrators, would not be valid without the approval of the Registrar General which had not been obtained.

6. That Donald McInnis was tenant of the property for some years and until after the negotiations for the purchase, and had made improvements on it on the strength of his purchasing it, could not be relied on as acts of part performance to take the

case out of the Statute of Frauds, as neither of the defendants knew anything about the improvements and there was no previous contract between the plaintiff and the defendants to which these acts could be referable.

*Maddison v. Alderson*, (1883) 8 A.C. 479, 480, followed.

*McInnis Farms v. McKenzie*  
.....120

7. *Misrepresentation—Rescission of contract—Innocent mistake.*—Action by vendor for balance due under an agreement of sale of a lot fronting on the Winnipeg River. The purchaser asked for rescission of the agreement on the ground of misrepresentation by the vendor and for the return of the money already paid.

According to the findings of fact, the defendant told the plaintiff he wished to purchase a lot having a sandy beach fronting on the river and the plaintiff personally showed him such a lot, stating that it was his, whereupon the defendant, relying on these statements, agreed to purchase the lot at a named price. The lot described in the agreement subsequently entered into, however, had no sandy beach on it.

*Held*, that the plaintiff's statements and representations were material to the contract, and, being untrue although perhaps innocently made, the defendant was entitled, in equity, upon discovery of their falseness, to have the contract, which was still an executory one, set aside and his payments returned to him, with interest.

*Wolfe v. McArthur*, (1907) 18 M.R. 30, followed.

*McMeans v. Kidder* . . . . . 111

8. *Cancellation of agreement of sale for default—Redemption.*—In an action by the vendor of land for the foreclosure of the rights of the purchaser by reason of his default in payment of a subsequent instalment of the purchase money, and for a declaration that the agreement has been cancelled and any moneys already paid forfeited, pursuant to the provisions of the agreement, the plaintiff is not entitled to judgment for immediate cancellation, although he defendant admits his liability, but the Court will allow him three months to redeem.

*Canadian Fairbanks Co. v. Johnston*, (1909) 18 M.R. 590, followed.

It is not necessary that the defendant should expressly ask for this relief in his statement of defence.

*Pentland v. Mackissock* . . . . . 1

9. *Agreement of sale—Remedies of vendor on default of payment—Judgment for sale instead of foreclosure—Pleading—Motion for judgment.*—A statement of claim in an action by a vendor of land praying for a sale of the land upon default in payment of an instalment of the purchase money payable under the agreement of sale should, in strictness, set up that the plaintiff is entitled to a vendor's lien for the unpaid purchase money and ask for a declaration by the Court that he is so entitled; but, where facts are alleged from which, as a matter of law, the existence of such lien

would be inferred, and there is a distinct prayer for a sale of the land, it will be proper, on motion for judgment in an undefended case, to order a sale.

*Robinson v. Starr* . . . . . 848

10. *Specific performance—Rectification of agreement—Statute of Frauds—Principal and agent—Agreement of sale of land—Formal contract contemplated but not executed—Description of land—Parol evidence.*—The defendant verbally agreed to sell to one Reese, the plaintiff's agent, half of a certain described lot, and gave Reese a receipt for \$25 paid as a deposit on the purchase. The receipt erroneously referred to the property as the west half instead of the east half of the lot, as the defendant supposed at the time that it was the west half that he had bought a short time before. Then followed correspondence between the parties or their solicitors respecting the execution of a formal agreement of sale of the property which had been prepared with a corrected description of the land. This was never executed because the defendant repudiated the sale and returned the deposit, alleging as his reasons the absence of the person from whom he had bought and the consequent delay in making title.

*Held*, (1) Although the parties contemplated the signature of a more formal agreement, the defendant was bound by his receipt as between the parties that they were not to be bound until the execution of a formal agreement. The plaintiffs could enforce their agent, (2) contract with

though only his name had been used in the receipt and draft agreement of sale: *Filby v. Hounsell*, [1896] 2 Ch. 737.

(3) The defendant was not justified in refusing to complete the sale because the plaintiffs' solicitors had objected to an acceleration clause being inserted in the proposed agreement as there was nothing in the receipt referring to such a clause and, moreover, the defendant had given quite different reasons for his withdrawal.

(4) The receipt, taken along with the subsequent correspondence and the draft agreement fully set out in the judgment below, constituted a sufficient memorandum in writing to satisfy the Statute of Frauds although the number of the registered plan was, by error, set down as "38" instead of "386" in the draft agreement.

(5) The receipt alone, although it only described the property as part of "Lot 2, Block 23, being 25 feet on Marion St.", was a sufficient memorandum under the Statute, and the description of the land was sufficient as the defendant had identified it fully in his examination for discovery, parol evidence being admissible in such a case.

*McMurray v. Spicer*, (1868) L.R. 5 Eq. 527; *Owen v. Thomas*, (1834) 3 My. & K. 353, and *Heath v. Sandford*, (1907) 17 M.R., per Dubuc, C.J., at p. 103, followed.

(6) The contract should be rectified so as to make the description of the land correct and specific performance decreed.

*Selkirk Land & Investment Co. v. Robinson*.....774

11. *Statute of Frauds—Specific performance—Principal and agent—Real Property Act—Caveat.*—A memorandum in writing as to a sale of land signed by a person styling himself agent for the owners, but not mentioning the owner's name, is not sufficient to satisfy the Statute of Frauds, unless such agent had authority to act for and represent the owner in the matter of the sale: *Rossiter v. Miller*, (1878) 3 A.C. 1140, *Fry on Specific Performance*, p. 181, and *Maber v. Penskalski*, (1904) 15 M.R. 236.

When one of several joint owners of land assumes to make a sale of the land subject to the approval of the owners and such approval is not obtained, the purchaser cannot have specific performance against the person with whom he dealt in respect of such person's partial interest in the land, if he knew at the time that such person had only such partial interest.

One of several joint owners of land gave a purchaser a receipt for a deposit on account of a proposed sale of the land "subject to approval of owners," but the owners did not approve.

*Held*, that the purchaser acquired no interest in the land on which to found a caveat which he had registered under the Real Property Act and that such caveat should be vacated and set aside.

*Tremblay v. Dussault*.....128

See CONTRACT, 2.

See MISREPRESENTATION.

See PARTIES TO ACTION, 2.

**VENDOR'S LIEN.**

See STATUTE OF FRAUDS.

**VERDICT FOR NOMINAL DAMAGES.**

See EXECUTORS AND ADMINISTRATORS.

**VERDICT OF JURY.**

See NEGLIGENCE, 2.

**VOIDABLE TRANSACTION.**

See COMPANY, 3.

**VOID PROCEEDING.**

See COUNTY COURT, 1.

**VOLENTI NON FIT INJURIA.**

See EMPLOYER AND EMPLOYEE.

See NEGLIGENCE, 3.

**WAIVER.**

See ELECTION PETITION, 4.

See INSURANCE ON LIVE STOCK.

See VENDOR AND PURCHASER, 4.

**WARRANTY.**

*Collateral verbal agreement—Evidence—Lease of traction engine—Representation amounting to warranty.*—1. Parol evidence may be given to show that at the time of the execution of a written lease of land, and a traction engine and plowing outfit to be used in cultivating the land, the lessor represented to the lessee that the traction engine was in good working order, although the

lease itself contained no such statement or any warranty to that effect.

*Morgan v. Griffith*, (1871) L.R. 6 Ex. 70; *Erskine v. Adeane*, (1873) L.R. 8 Ch. 756; *Angell v. Duke*, (1875) L.R. 10 Q.B. 174, and *De Lassalle v. Guildford*, [1901] 2 K.B. 215, followed.

2. When such evidence shows that the representation so made was intended to be a warranty, it should be treated as such, and when it was an assertion of a fact as to which the lessor had special knowledge and the lessee had no knowledge or means of knowledge, and the lessee entered into the lease on the faith of the truth of the assertion, it should be held that it was intended to be a warranty and to confer upon the lessee a right of action for any breach of such warranty.

Opinion of Lord Moulton in *Heilbut v. Buckleton*, [1913] A.C. at p. 50, criticizing judgment of A. L. Smith, L.J., in *De Lassalle v. Guildford*, referred to.

3. There may be a binding verbal warranty entered into at the time of the execution of a written contract, provided it contradicts no term in the writing and is collateral to it, not in the sense of being subsidiary, but of being independent of, and not inconsistent with, it.

*Tocher v. Thompson* . . . . . 707

**WARRANTY OF AUTHORITY OF AGENT.**

See GUARANTY.

**WILL.**

1. *Rule against perpetuities—Manitoba Trustee Act, R.S.M.*

1902, c. 170, ss. 42-47—*King's Bench Act, Rules 994 et seq.*—*Application for advice, opinion or direction of Judge—Originating notice.*—A direction in the will of a testator to pay income to his named children during their lives or, in the event of the death of any of them leaving issue, then to pay the parent's share to such issue in equal shares *per stirpes* is not void for remoteness under the rule against perpetuities, because all the persons to whom income is directed to be paid must be ascertained and the interests conferred upon them become vested within twenty-one years from the expiration of the lives in being.

For the same reason, a direction, in the event of any child dying without issue leaving a husband or wife in needy circumstances, to pay a proportion of the income to such needy husband or wife, does not offend against that rule.

*Hale v. Hale*, (1876) 3 Ch.D. 643; *Pearks v. Moseley*, (1880) 5 A.C. 714, and *Seaman v. Wood*, (1856) 22 Beav. 591, distinguished, because the wills in those cases contained provisions postponing the vesting of the interests conferred to a period which might be beyond the period allowed by the rule.

A future interest created by a will is not obnoxious to the rule if it begins or becomes vested within the proper period, although it may end beyond it: *Gooch v. Gooch*, (1851) 14 Beav. 565; 3 De G. M. & G. 366, and *Stuart v. Cockerell*, (1869) L.R. 7 Eq. 363, 5 Ch. 713.

A Judge has no jurisdiction,

upon an application under sections 42 to 47 of the Manitoba Trustee Act, R.S.M. 1902, c. 170, to give his opinion, advice or direction as to whether a legacy in a will is void as violating the rule against perpetuities.

*Re Lorenz*, (1861) 1 Dr. & S. 401; *Re Hooper*, (1861) 29 Beav. 656; *Re Williams*, (1877) 1 Ch. 372, and *Re Rally*, (1911) 25 O.L.R. 112, followed.

But a Judge may decide such a question in a proceeding commenced by originating notice under Rules 994 *et seq.* added to the King's Bench Act by 3 Geo. V, c. 12: *Re Carlyon*, (1886) 35 W.R. 155; *Re Davies*, (1888) 38 Ch. D. 210; *Re Royle*, (1889) 43 Ch. D. 18; *Re Whitty*, (1899) 30 O.R. 300, and *Re Wilson*, (1885) 28 Ch. D. 461, and by consent of parties a petition for advice under the Trustee Act may be turned into a proceeding by originating notice under said Rule 994.

*Re Crichton Estate* . . . . . 594

2. *Inconsistent provisions in will*—*Devise of particular property to A followed by general devise of all property to B—Originating notice*—*The Manitoba Trustee Act, R.S. M. 1902, c. 170, ss. 42—King's Bench Act, Rule 994—Proceedings to obtain construction of a will—Practice.*—The will which the Judge was asked to construe contained, in clause 3, a devise of a particularly described property to A, in clause 4, a devise of another particularly described property to B and, in clause 5, a gift to B of "all the real and personal property or estate to which I shall be entitled at the time of my decease."



*Held*, that the devise to A was not in any way affected by clause 5 of the will which should be treated as only a gift to B of all the residue of the estate after the specific devises in clauses 3 and 4.

If there is an express contradiction between the two clauses in a will the second clause must take effect over the first one, but there was not here any contradiction or repugnancy between clauses 3 and 5, especially in view of clause 4.

It is a settled rule in the construction of a will not to disturb a prior devise further than is absolutely necessary for the purpose of giving effect to the posterior qualifying disposition: *Jarman on Wills*, 569.

The construction of a will may be determined in a proceeding by originating notice under Rule 994, added to the King's Bench Act by 3 Geo. V, c. 12, s. 10.

*Re Sherlock*, (1897) 18 P.R. 6; *Re Whitty*, (1899) 30 O.R. 300; *Re Lacasse*, (1913) 9 D.L.R. 831, and *Re Rally*, (1911) 25 O.L.R. 112, followed.

*Semble*. There is no power in the Court, upon a petition under section 42 of The Manitoba Trustee Act, R.S.M. 1902, c. 170, to determine the rights of the parties or any party under a will, or to give its opinion for the guidance of trustees, the object of that section being only to obtain advice or directions as to unimportant matters of discretion, &c. See cases collected in 17 C.L.T. 287.

*Re Dion*.....549

### 3. Absolute gift of whole estate

*to widow followed by authority to executors to dispose of it, and in the meantime "to manage it for the best advantage of my heirs"—Repugnant clauses—Devolution of Estates Act, R.S.M. 1902, c. 48, s. 22—Meaning of word "heirs."*—1.

An absolute gift by a testator of all his real and personal estate to his widow will not be cut down by a subsequent clause authorizing his executors "to dispose of it at any time which they shall deem most advantageous and, until such time, to manage it for the best advantage of my heirs", although the deceased left a child as well as the widow surviving him.

The rule that, when there are two inconsistent clauses in a will, the later clause revokes the previous one is subject to the qualification that it must be reasonably clear that the testator intended to revoke the prior gift.

*Re Farrell*, (1912) 4 D.L.R. 760; *Adshead v. Willetts*, (1861) 9 W.R. 405; *Kiver v. Oldfield*, (1859) 4 De G. & J. 30, followed.

2. In section 22 of the Devolution of Estates Act, R.S.M. 1902, c. 48, which defines the expressions "heirs", "heirs and assigns", &c., when used "in any instrument to which the deceased was a party or in which he was interested", the word "instrument" was not meant to include wills, and the word "heirs" used in the will was not necessarily intended to refer to the infant and should be interpreted as indicating the widow as the person entitled to the estate or made by the will "heir" to it, to avoid defeating the intention of the testator to

leave all to the widow clearly expressed in the preceding clause.

3. It having been shown that all the debts of the estate had been paid, except a mortgage on a parcel of real estate, the executors should convey all the estate to the devisee, notwithstanding the discretion apparently given to them to postpone disposing of it, subject to the widow making a satisfactory arrangement to protect them from any claim on the mortgage.

*Re Hamilton*, (1912) 8 D.L.R. 529, followed.

*Re Freedy, Deceased* ..... 763

## WINDING-UP OF COMPANY.

1. *Dominion Winding Up Act*, R.S.C. 1906, c. 144, ss. 6, 11—*Constitutional Law—Company incorporated under Provincial legislation—Ultra Vires—Bankruptcy and insolvency—Insolvency of Company, proof of—Affidavit evidence.*—1. Any scheme of bankruptcy or insolvency legislation necessarily involves the rateable distribution among his creditors of the assets of the insolvent whether he is willing that they should be so distributed or not, and the result of the decision in *Atty. Gen. for Ontario v. Atty. Gen. for Canada*, [1894] A.C. 189, is, in effect, that, when a voluntary assignment is made by a debtor for the benefit of his creditors, a Provincial Legislature has power, under its jurisdiction over Property and Civil Rights, to give the assignment precedence over judgments, attachments, &c., and to make other provisions for

effecting the rateable distribution of the debtor's assets among his creditors, but that, wherever the element of compulsion is to be applied in dealing with an insolvent estate, the Parliament of Canada may exclusively pass the necessary legislation.

2. The words "Bankruptcy and Insolvency," in section 91 of the British North America Act, should have the widest meaning assigned to them and they should be interpreted as covering the whole field of legislation relating to the compulsory liquidation and distribution of the assets of debtors, which power necessarily carries with it the right to declare certain things to be acts of insolvency, although they were not theretofore regarded as such, and to declare what shall be evidence of insolvency or of a state of affairs which will justify the taking of proceedings under the Act.

3. Parliament, therefore, has power to provide, as it does in the Dominion Winding Up Act, R.S.C. 1906, c. 144, ss. 6, 11, that a loan Company having borrowing powers, though incorporated under Provincial legislation, and whether or not it was insolvent in the meaning of that word as previously understood, should be deemed to be insolvent, (a) if, at a special meeting of the shareholders called for the purpose, it has passed a resolution requiring the Company to be wound up, or, (b) if the Company is in liquidation or in process of being wound up, and that, if either of these conditions exists, a winding up order may be made under the Act.

*L' Union St. Jacques v. Belisle*, (1874) L.R. 6 P.C. 31, *Cushing v. Dupuy*, (1880) 5 A.C. 409, and *Re Union Fire Ins. Co.* (1885) 10 O.R. 489, (1886) 13 A.R. 269, (1887) 14 O.R. 618, (1887) 14 S.C.R. 624, (1889) 16 A.R. 161, (1890) 17 S.C.R. 265, followed.

*Re Cramp Steel Co.*, (1908) 16 O.L.R. 230, dissented from.

4. In view of the history of bankruptcy legislation, both in England and Canada, provisions in an insolvency Act, such as the Dominion Winding Up Act is, constituting the conditions above referred to to be acts of bankruptcy or insolvency, though the Company may have assets sufficient to meet its liabilities to creditors, must be considered as reasonable in themselves and as naturally incidental to an insolvency law, and not improper or unwarranted usurpations of power belonging to the Provincial Legislatures.

5. A shareholder is entitled to petition for a winding up order under the above circumstances.

*Per* HAGGART, J.A. The voluntary winding up of a company is the same in effect as an assignment from an individual to a trustee for creditors which has always been regarded by the Courts as an act of bankruptcy, even before it was so made by statute; *Halsbury*, vol. II, p. 14.

The facts proved by the affidavits filed also justified an order to wind up since they showed, independently of other matters, that it was just and equitable that the Company should be wound up (par. (e) of section 11 of the Act).

*In re Gold Company*, (1879) 11

Ch. D., per James, L.J., at pp. 709, 710, and *In re West Surrey Tanning Co.*, (1866) L.R. 2 Eq. 737, followed.

HOWELL, C.J.M., dissented, holding that it was *ultra vires* of the Parliament of Canada to provide for the compulsory winding up of a company incorporated by a Provincial Legislature, unless it was shown to be actually insolvent, which was not shown in this case, following *Re Cramp Steel Co.* (1908) 16 O.L.R. 230; also that affidavits on information and belief merely are not sufficient to support a petition under the Act: *Re Manitoba Commission Co.*, 22 M.R. 269.

*Re Colonial Investment Co.* .871

2. *Second application for—Res judicata—Creditor's right to order—Evidence—Insolvency—Winding Up Act*, R.S.C. 1906, c. 144, s. 3.](1) The dismissal of a former application for an order to wind up a company under The Winding Up Act, R.S.C., 1906, c. 144, for want of sufficient material, is no bar to a subsequent application for an order by other creditors upon fresh material.

(2) When the company is insolvent an unpaid creditor is entitled to a winding up order as a matter of right: *In re Chapel House Colliery Co.*, (1883) 24 Ch. D. 259, if it is shown that there are any assets to be administered: *Re Georgian Bay, &c., Co.*, (1889) 29 O.R. 358.

(3) Proof of an unsatisfied judgment against the company

and that it had called a meeting of its creditors, at which the manager stated that the company was unable to pay its debts and offered to compound with the creditors, is sufficient evidence of insolvency, under section 3 of the Act, to warrant the making of the order.

*Re Manitoba Commission Co.* . . . 477

# **WORDS.**

"Arbitration now pending."

See ARBITRATION AND AWARD, 1.

"Heirs."

See WILL, 3.

"Interest" in land.

See REAL PROPERTY ACT, 2.

"Wrongful dismissal."

See JURY TRIAL, 4.

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